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A COLLECTION OF ALL

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DECIDED BY THE COURTS OF  
LAST RESORT

IN THE

UNITED STATES, ENGLAND AND CANADA.

EDITED BY

THOMAS J. MICHIE.

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THE  
AMERICAN AND ENGLISH  
RAILROAD CASES

NEW SERIES.

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VOLUME XX.

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YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Plffs.  
in Err.,

v.

WIRT ADAMS.

*(Argued Oct. 22, 23, 1900. Decided January 7, 1901.)*

[21 Sup. Ct. Rep. 240.]

**Error to State Court—Federal Question—When Raised.**—A Federal question is not set up in a state court soon enough to sustain a writ of error from the Supreme Court of the United States to the state court, when it is not presented until after the case has been decided by the supreme court of the state and remanded to the lower court for new trial,—especially when it is raised by new pleas filed without the leave of court, which the state practice requires.

**Federal Question Impliedly Raised.**—A Federal question as to the impairment of the obligation of a contract was sufficiently raised in a state court for the purpose of a writ of error from the Supreme Court of the United States, although the contract clause of the Federal Constitution was not discussed, where the case turned upon the existence of such a contract and no question seems to have been made that, if there had been a contract, it was impaired by the state legislation.

**Impairing Obligation of Contracts—Exemption from Taxation—Effect of Consolidation of Railroads.\***—A new grant of corporate franchises, within the meaning of Miss. Const. 1890, § 180, making such grants subject to constitutional provisions which require the property of corporations to be taxed like that of individuals, is made by a subsequent consolidation between railroad companies which had exemptions from taxation prior to the adoption of the new Constitution, but which, by articles of consolidation, agree to merge and consolidate their properties, immunities, and privileges, and substitute for their shares, shares in the new company, although there is a clause in the articles providing that the consolidation shall be effected without disturbing the corporate

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\*See notes at end of case.



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existence of one of the old companies "or the formation of any new distinct corporation, unless such result shall be necessary to give legal effect to this agreement," where the effect of the consolidation is to surrender the entire administration of the functions of the constituent companies to a new corporation with a new corps of officers.

In error to the Supreme Court of Mississippi to review a decision affirming a judgment for taxes against a railroad company claiming an exemption. Affirmed.

See same case below, 77 Miss. 194, 24 So. 200, 317.

Statement by Mr. Justice Brown:

This case originated in an action at law begun December 7, 1893, in the circuit court for the first district of Mississippi, by Wirt Adams, revenue agent, suing for the use of the state and of the counties through which the defendant railways pass, against the Yazoo & Mississippi Valley Railroad Company, incorporated under an act of the legislature of Mississippi of February 17, 1882, and also against the Illinois Central Railroad Company, as successors in interest, by consolidation, of a number of other railways, to recover taxes assessed by the railroad commission of that state for the year 1892.

Exhibits annexed to the declaration showed that the Yazoo & Mississippi Valley Railroad Company, as now constituted, was the result of a consolidation made October 24, 1892, between a company of the same name, chartered as above stated, February 17, 1882, and the Louisville, New Orleans, & Texas Railway Company, which latter company was itself formed by a consolidation made August 12, 1884, of the Tennessee Southern Railroad Company, the Memphis & Vicksburg Railroad Company, the New Orleans, Baton Rouge, Vicksburg, & Memphis Railroad Company, and the New Orleans & Mississippi Valley Railroad Company.

On December 27, 1893, a plea was filed by the Illinois Central Railroad Company, denying certain of the allegations in the declarations; and a separate plea was filed by the Yazoo & Mississippi Valley Railroad Company, claiming in its own favor the benefit of the charter of the Louisville, New Orleans, & Texas Railroad Company exempting such company from the assessment of these taxes by reason of the payment of the same in the construction of its road, and also denying material allegations of the declaration. No Federal question appeared in either of these pleas. A demurrer to these pleas having been overruled, replications were filed.

On December 18, 1894, another action was begun against the same defendants for the taxes of 1893 and 1894, and on January 1, 1896, another for the taxes of 1895. An order was made consolidating these actions.

The three cases thus consolidated came on for trial before a jury, and resulted in a verdict and judgment July 25, 1896, in favor of the plaintiff for the taxes of 1895, and in favor of

the defendants for the taxes of 1892, 1893, and 1894. Both parties moved for a new trial, which was denied. Both parties appealed to the supreme court, but neither assigned a ruling upon a Federal question as error. The supreme court reversed the judgment of the court below, and remanded the case for a new trial. 77 Miss. 194, 24 So. 200. The court June 20, 1898, filed a summary of its holding to the effect, first, that the case of the Natchez, J. & C. R. Co. v. Lambert, 70 Miss. 779, 13 So. 33, which apparently had been set up as res judicata, was an estoppel only as to taxes for the year 1892 on property originally belonging to the Natchez, Jackson, & Columbus Railroad Company in Adams county, but not upon other property, or as to the taxes for other years; second, that the Yazoo & Mississippi Valley Railroad Company was a new corporation taking its life from the date of the consolidation, and overruling the Lambert Case to the contrary; third, that the 21st section of the Mobile & Northwestern Railroad Company's charter was an effort to secure an irrepealable grant of exemption, was in violation of the Constitution of 1869, and that it would have been a violation even if it had not been irrepealable, and the case of Mississippi Mills v. Cook, 56 Miss. 40, to the contrary was overruled. 77 Miss. 305, 24 So. 318. A motion to strike out this "summary of holdings" was denied November 28, 1898. 77 Miss. 302, 24 So. 317.

Meantime two new actions had been begun in the circuit court for the taxes of 1896 and 1897, which were also consolidated with the others.

On July 4, 1898, the mandate of the supreme court reversing the judgment of the court below was filed in the circuit court. Meantime, however, and on June 27, 1898, defendants filed a petition and bond for a removal of the cause to the circuit court of the United States upon the ground that the case arose under the Constitution and laws of the United States. This petition was also denied July 4, upon the day the mandate was filed.

Thereupon each of the defendants July 6, 1898, filed special pleas to the declaration, setting forth at great length the exemption claimed under the charters of their constituent companies, and alleging that such exemption constituted a contract which had been impaired by the action of the state. Motion was made by the plaintiff to strike out certain of these pleas, viz., the 3d, 4th, 5th, 6th, and 7th, as constituting no defense to the action, which was granted by the court; and all of such pleas, except the 7th, which was withdrawn, were stricken from the files. Whereupon the defendants, "to meet the new aspect put upon the case by the decision of the supreme court herein rendered on June 20, 1898," withdrew "their joint plea filed by them prior to such decisions, and all other pleas filed before that decision," and also withdrew the two pleas filed by them respectively at this term (No. 2), and declined to plead further herein. They did not, however, withdraw the pleas

which had been stricken out by the court. A judgment was entered the same day nil dicit against the defendants for the amount sued for in said consolidated case, amounting in all to \$548,676.99. The case was again appealed to the supreme court and a new opinion rendered February 20, 1899, reiterating its former views and affirming the judgment of the court below. 77 Miss. 315. Whereupon defendants sued out this writ of error.

Messrs. Wm. D. Guthrie, Edward Mayes, James Fentress, Noel Gale, and J. M. Dickinson for plaintiffs in error.

Messrs. R. C. Beckett, J. A. P. Campbell, S. S. Calhoon, Marcellus Green, and F. A. Critz for defendant in error.

Mr. Justice Brown delivered the opinion of the court:

Motion was made to dismiss this writ of error upon the grounds: First, that the Federal question was not raised until after the decision of the supreme court on June 20, 1898. Second, that the action of the defendants in withdrawing their pleas and permitting a judgment nil dicit to go against them, because the circuit court had struck from the files their additional pleas attempting to set up a Federal question, was an admission that they had no defense upon the facts of the case, and deprived them of any right to insist upon a Federal question. Third, that the petition for removal was not made until after the case had been tried in the state supreme court, and reversed and remanded. No claim of error in the action of the state court in this last particular was made in this court. Indeed, the point seems to have been abandoned. Fourth, that the decision of the state supreme court on the first appeal, that the alleged exemption, if it existed at all, was lost by the consolidation of October 24, 1892, raised no Federal question. Several other reasons are assigned for the motion, but they are either addressed to the merits of the case, or become immaterial in the view we have taken of those herein specified.

1. Was the Federal question raised too late? The special pleas setting up distinctly the Federal question were filed after the case had been decided by the supreme court, its mandate had gone down to the circuit court, and the case was ready for a new trial. As already stated, certain of these pleas were stricken out upon motion of the plaintiff as constituting no defense to the action, and all the pleas, except such as had been stricken out by the court, were then withdrawn, and a judgment nil dicit entered. On the case being again carried to the supreme court, that court held that the action of the court below "in striking out the special pleas stricken out was correct, for the obvious reason that they presented no defense to the action, in whole or in part. The former opinion of the

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court in this case settled definitely and conclusively all the issues involved, and the special pleas are in effect nothing else than an effort to have the circuit court disregard that opinion. The futility of that sort of pleading needs no sort of comment. These and all the other matters of practice and procedure assigned for error were correctly settled by the court. The former opinion of this court in this cause, and its opinion on the motion to strike that opinion from the files, disposed effectively of such of these matters as are not here specifically adverted to." 77 Miss. 315.

It is very evident that the circuit court, in striking out these pleas, took the view that the supreme court had, upon the first hearing, settled the law to be that no valid contract of exemption existed, and that if such contract existed in favor of the Louisville, New Orleans, & Texas Railway Company (hereinafter styled the Louisville Company) it had been lost by the consolidation of October 24, 1892, and that the only effect of the special pleas was to inject a claim under the Federal Constitution as an argument for reversing its ruling. These pleas evidently raised precisely the same questions that had been settled in a slightly different form. The circuit court treated this as an attempt to induce it to overrule the action of the supreme court, which, of course, was impossible. The supreme court not only held that the circuit court was correct in this view, but that, the issues having already been settled, it would itself treat them as *res judicata*. This accords with what seems to be the uniform practice of the Mississippi courts. Thus, in *Smith v. Elder*, 14 Smedes & M. 100, it was held that where a demurrer to a plea, which had been sustained in the court below, was overruled by the supreme court, all the legal questions raised by the demurrer would be considered as having been settled by the decision overruling it; and that such decision would not only be binding upon the inferior, but also upon the appellate court. So also in *Bridgeforth v. Gray*, 39 Miss. 136, it was held that, where the construction of a will had been settled upon demurrer to a bill in chancery, the court would not permit that question to be reopened upon a hearing upon the merits, notwithstanding the chancery court of Tennessee in the meantime had placed a different construction upon the will. This is also the rule in this court. *Wayne County Supers. v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *The Lady Pike*, 96 U. S. 461, sub nom. *Pearce v. Germania Ins. Co.* 24 L. Ed. 672; *Thompson v. Maxwell Land Grant & R. Co.* 168 U. S. 451, 42 L. Ed. 539, 18 Sup. Ct. Rep. 121. See also *Hook v. Richeson*, 115 Ill. 431, 5 N. E. 98; *Brooklyn v. Orthwein*, 140 Ill. 620, 31 N. E. 111; *McKinney v. State ex rel. Nixon*, 117 Ind. 27, 19 N. E. 613.

In this aspect the case is much like that of *Union Mut. L. Ins. Co. v. Kirchoff*, 169 U. S. 103, 42 L. Ed. 677, 18 Sup. Ct.

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Rep. 260. In that case the insurance company had loaned money to Kirchoff, and had filed a bill to foreclose the trust deed. Pending this bill an agreement was entered into for the release to Kirchoff of two of the lots embraced in the foreclosure proceedings, but it was agreed that these proceedings should be prosecuted, and, as soon as the company obtained a deed from the master, it would convey to Kirchoff. No defense was made to the foreclosure, and the case went to a decree, and the property was sold. The case went to the supreme court of Illinois, which found the agreement between Mrs. Kirchoff and the insurance company as claimed by her, determined that she was entitled to the release sought, and remanded the case for the purpose of an accounting. As stated by the Chief Justice: "The record does not disclose that any right or title was specially set up or claimed under any statute of, or authority exercised under, the United States in the courts below, or in the supreme court of Illinois prior to the decision of the latter court on the first appeal. . . . The errors there assigned nowhere in terms raised a Federal question. And in affirming the judgment of the appellate court the supreme court did not consider or discuss any Federal question as such in its opinion." It appears to have turned upon questions of fact. "It is now contended that it then appeared that defendant claimed to hold an absolute title to the lots in question by virtue of the foreclosure proceedings and the master's deed obtained thereunder, and hence that the title was claimed under an authority exercised under the United States; that a Federal question was thereby raised on the record; that the decision of the case necessarily involved passing on the claim of title." Upon the second appeal it was assigned as a Federal question that the circuit court erred in entering a decree which would in effect nullify the decree of foreclosure of the circuit court of the United States, and in refusing to the defendant leave to file the proposed amendment to its answer. "The appellate court on the second appeal held itself bound by the previous decision, and declined to enter on matters of defense which might have been availed of. The supreme court was of the same opinion, for it ruled that where a case had once been reviewed by the court, and remanded with directions as to the decree to be entered, error could not be assigned on a subsequent appeal for any cause existing at the time of the prior judgment." This court dismissed the writ of error, holding that, as the supreme court did not reopen the case as to matters previously adjudicated, and as the Federal question was not set up upon the first appeal, there was no action of that court in relation to it which we were called upon to revise. See also Northern P. R. Co. v. Ellis, 144 U. S. 458, 36 L. Ed. 504, 12 Sup. Ct. Rep. 724; Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 40 L. Ed. 991, 16 Sup. Ct. Rep. 850.

Federal Question  
Impliedly Raised.

It is true that in the suit under consideration the case was not formally sent back for an accounting, but it was practically so, since all the questions of law had been settled upon the first appeal, beyond the power of the circuit court to reopen, and upon the remand that court could do nothing else than enter judgment for the taxes of 1892, 1893, and 1894, as well as for the taxes of 1895. The supreme court, in deciding that it would not reopen the question involved upon the first hearing, to let in the Federal defense presented by the new pleas, merely settled a question of practice which we cannot review.

By another process of reasoning we are led to the same conclusion. No leave was applied for or granted to file these additional pleas after the issues had been made up, as seems to be required by the practice in Mississippi, where it is said that all such pleas must be presented, with the application to file them, to the court, that it may judge of the propriety of the proposed action (*Hunt v. Walker*, 40 Miss. 590; *Pool v. Hill*, 44 Miss. 306; *Pfeifer v. Chamberlain*, 52 Miss. 90); and even if leave had been asked to file them, it was matter of discretion with the trial court to permit it, and a matter of state practice which cannot be inquired into here. *Stevens v. Nichols*, 157 U. S. 370, sub nom. *Carr v. Nichols*, 39 L. Ed. 736, 15 Sup. Ct. Rep. 640; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 199, 37 L. Ed. 701, 13 Sup. Ct. Rep. 859; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 688, 41 L. Ed. 1166, 17 Sup. Ct. Rep. 718. We are therefore of opinion that the Federal question was "specially set up and claimed" too late to be of any avail to the plaintiffs in error.

2. But the very arguments urged upon us by the defendant in error for holding that the Federal question was set up too late, as well as the reasons given for affirming the decree of the court in striking out the additional pleas, furnish a strong argument in favor of the position assumed by the railroad companies, that the Federal question was necessarily involved and must have been passed upon at the first hearing. This argument is in substance that the pleas were properly stricken out, because they presented no defense as the case then stood, by reason of the decision of the supreme court on the first appeal. 77 Miss. 194, 237, 24 So. 200.

In order to ascertain exactly what was in issue and what was decided by the supreme court, it is necessary to set forth the facts at some length. The original declaration averred the several consolidations by which the defendant companies were formed; the assessment of the same for taxation by the railroad commission; a copy of the assessment by counties; and the refusal to pay. Annexed thereto as exhibits were copies of the various charters and contracts of consolidations.

Underlying all the questions in the case are the following provisions of the Constitution of 1869:

"Art. 12, sec. 13. The property of all corporations for

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pecuniary profits shall be subject to taxation the same as that of individuals."

"Sec. 20. Taxation shall be equal and uniform throughout the state. All property shall be taxed according to its value, to be ascertained as directed by law."

By the 21st section of an act to incorporate the Mobile & Northwestern Railroad Company, approved July 20, 1870, the state "hereby agrees with said company (and which agreement is irrevocable) that all taxes to which said company shall be subject for the period of thirty years are hereby appropriated and set apart, and shall be applied to the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company, upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same. . . . Provided, however, That whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of 8 per cent., upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

By an act of August 8, 1870, the provisions of this section were extended to the Memphis & Vicksburg Railroad, the Natchez & Jackson Railroad, and a number of others not necessary here to be mentioned.

The Memphis & Vicksburg Railroad Company was incorporated the same day, August 8, 1870. The 16th section of this act enacted "that said company shall have the right and power to consolidate the stock, property, and franchises of the road with any other road or roads, in or out of this state, at any time the president and directors of the road may deem proper, and upon such terms as may be consistent with the powers conferred upon said company."

By an act to incorporate the New Orleans, Baton Rouge, Vicksburg, & Memphis Short Line Railroad Company (hereinafter called the Baton Rouge Company), approved March 9, 1882, it was enacted (§ 25) "that the company shall have power and authority to purchase and hold any connecting railroad, and to operate the same, or to consolidate the company with any other company under the name of one or both; but when such purchase is made, or consolidation is effected, the said company shall be entitled to all the benefits, rights, franchises, lands, and property of every description belonging to said road or roads so sold or consolidated."

Both these two last-mentioned companies were consolidated by an agreement made August 12, 1884, into the Louisville, New Orleans, & Texas Railway Company.

By an act approved March 3, 1882, and an act amendatory thereto of March 15, 1884, the Memphis & Vicksburg Road was authorized to consolidate with any other company or com-

panies, "whether such company or companies have been incorporated under the laws of this state or of any other state, so that all of the companies so consolidating shall be merged into and become one company; and the company so formed by such consolidation shall be deemed and held to be a corporation created by the laws of this state, and shall have, enjoy, and possess all the rights, ways, privileges, franchises, property, grants, and immunities which are now possessed by the companies which may enter into such consolidation, as fully as though the same were conferred specially in this act." Another section (5) applied the 21st section of the Mobile & Northwestern charter to the company so consolidated.

By further act of February 17, 1882, the Yazoo & Mississippi Valley Railway Company (hereinafter called the Yazoo Company), was authorized "to consolidate with any other railroad company in or out of Mississippi, upon such terms as the consolidating companies might agree upon, . . . and upon any such consolidation the said consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties, immunities, and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidating company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation, acquire under the provisions of the charter of such other consolidated company." Finally by the act of February 19, 1890, the Louisville, New Orleans, & Texas Company, and the Natchez, Jackson, & Columbus Company were authorized to consolidate with each other under the name of the Louisville, New Orleans, & Texas Company, and upon such terms as might be agreed upon by the companies.

In 1890 the State adopted a new Constitution, the following clauses of which only are pertinent:

"Sec. 180. All existing charters or grants of corporate franchise under which organizations have not in good faith taken place at the adoption of this Constitution shall be subject to the provision of this article," etc.

"Sec. 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals. Exemptions from taxation, to which corporations are legally entitled at the adoption of this Constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters or by general laws, unless sooner repealed by the legislature."

On October 24, 1892, articles of consolidation were entered into between the Louisville Company and the Yazoo Company, the effect of which will hereafter be considered.

By the Code of Mississippi of 1892, § 3875, a system of taxing the property of railroad companies by the railroad com-



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mission was put in force. This article provided for a complete schedule of the property of the company, the total amount of its capital stock, its par value, and the value of its franchise; and by a law subsequently enacted, February 7, 1894, a state revenue agent was provided for, whose duty it was to enforce the payment of taxes by all classes of property owners. It was under the provisions of the laws of 1892 that this action was begun.

The railroad companies went to a trial of these cases in an obvious reliance upon two previous decisions of the supreme court of Mississippi. In the first one (*Mississippi Mills v. Cook*, 56 Miss. 40) that court held the constitutional provision that "the property of all corporations for pecuniary profits shall be subject to taxation" did not require that such corporations must always be subjected to taxation, but that their property could not be placed beyond the reach of the taxing power; and that the legislature might exempt property of a particular class, whether the owners were corporations or natural persons; in other words, that the provision was mandatory as to the liability of such property to be taxed, but permissive to the legislature to tax it or exempt it, as might seem proper. It further held that the provision of § 20, that "all property shall be taxed in proportion to its value," did not require that all property should be taxed, or deny to the legislature the right to exempt any; that the legislature might exempt property of a certain class, or property used for a certain purpose; that it had the power to select such objects of taxation as it might deem appropriate; but when any article of property was selected for taxation it must be taxed in proportion to its value, and not specifically.

In the second case (*Natchez, J. & C. R. Co. v. Lambert*, 70 Miss. 779, 13 So. 33) that court held the exemption in the 21st section of the charter of the Mobile & Northwestern Railroad was one which the legislature had power to confer, but not to make irrepealable; that under the acts of August 8, 1870, and March 5, 1878, this immunity from taxation was extended and confirmed to the Natchez, Jackson, & Columbus Railroad Company, and by the act of February 19, 1890, authorizing a consolidation with the New Orleans, Louisville, & Texas Company, the latter company by its consolidation acquired the immunities of the former company, and was entitled to the same exemption from taxation; also, that after the consolidation of the Louisville Company with the Yazoo Company the latter succeeded to the same immunity from taxation on that part of its lines which formerly comprised the Natchez, Jackson, & Columbus Railroad. In short, these cases cover practically every point involved in the case under consideration, and counsel evidently acted upon the theory that it was unnecessary to specifically set up and claim that there was a contract for exemption which the legislature had subsequently impaired.

But upon the hearing of the case under consideration the court (now differently constituted) overruled both of these cases, and held, first, that the legislature could not grant an exemption to a railway company under the Constitution of 1869; second, that it could not grant an irrevocable exemption under that Constitution; third, that a new company was formed by the consolidation of October 24, 1892, and no exemption passed into it; fourth, that if the consolidation were a technical merger, still, § 180 of the Constitution of 1890 prevented any exemption from passing into it; fifth, that any such exemption was repealed by the acts of 1884, 1886, and 1890. Manifestly, that court could not have held the railways liable for the taxes in suit without deciding either that the provision of § 21 did not constitute a legal contract in view of the Constitution of 1869, or that no such contract existed in favor of the plaintiffs in error in view of the consolidations, or that the subsequent tax legislation of the state of 1892 and 1894 did not impair the obligation of that contract. All these were Federal questions, the vital one being whether the acts of 1892 and 1894 impaired the obligation of the contract, if any existed.

In short, the case is one of those frequently arising under the 2d clause of Rev. Stat. § 709, in which the validity of a state statute under the Constitution of the United States is necessarily drawn in question, and, the decision of the state court being in favor of its validity, this court will take jurisdiction, though the Federal question be not specially set up or claimed. As we have repeatedly had occasion to hold, it is only in cases arising under the 3d clause of the section, where a right, title, privilege, or immunity is claimed, that the Federal question must be specially set up. The cases are collected in *Columbia Water Power Co. v. Electric Street Railway, Light & Power Co.*, 172 U. S. 475, 488, 43 L. Ed. 521, 525, 19 Sup. Ct. Rep. 247. Thus, in *Willson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. Ed. 412, the record did not show that the constitutionality of an act of a state legislature was drawn in question; "but," said the Chief Justice, "we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court." So, in *Satterlee v. Matthewson*, 2 Pet. 380, 7 L. Ed. 458, it was said that, if it sufficiently appear from the record itself that the repugnancy of the statute of a state to the Constitution of the United States was drawn in question, this court has jurisdiction, though the record does not in terms declare that this question was raised. See also *Crowell v. Randell*, 10 Pet. 368, 9 L. Ed. 458; *Furman v. Nichol*, 8 Wall. 44, 19 L. Ed. 370; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. Ed. 1084, 15 Sup. Ct. Rep. 681; *Eureka Lake & Y. Canal Co. v. Yuba County Super. Ct.*, 116 U. S. 410, 29 L. Ed. 671, 6 Sup. Ct. Rep. 429; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S.

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254, 35 L. Ed. 1004, 12 Sup. Ct. Rep. 173. And the fact that the supreme court of the state did not expressly refer to the contract clause of the Constitution does not prevent our taking jurisdiction, if the applicability of such clause were necessarily involved in its decision. As was said by Chief Justice Waite in *Chapman v. Goodnow*, 123 U. S. 540, 548, 31 L. Ed. 235, 238, 8 Sup. Ct. Rep. 211, 215: "If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

The decision of the supreme court that the exemption in the Mobile & Northwestern Railroad Company's charter of 1870 was void under the Constitution of 1869 was practically a decision that the contract of the state was beyond the power of the legislature, and void, and hence there was no contract to be impaired. But, conceding this contract to have been valid, another distinct question arose, whether that contract enured to the benefit of the plaintiffs in error by the successive consolidations; in other words, whether, as to the plaintiffs in error, there was any contract ever existing which the taxing legislation of Mississippi could impair. Both these questions were ruled against the railroads; and, while the contract clause of the Federal Constitution was not discussed, the case turned upon the existence of such a contract, and no question seems to have been made that, if there had been a contract, it was impaired by the taxing legislation of 1892. As we have often held that where an impairment of a contract by state legislation is charged, the existence or nonexistence of the contract is a Federal question, it is impossible to escape the conclusion that the foundation of the whole case was whether there was really a contract which had been impaired, and that this was necessary to the determination of the case. As already stated, this was a Federal question, and the fact that the supreme court did not in terms discuss the contract clause of the Constitution does not oust our jurisdiction. In view of this record and the opinions of the supreme court, the certificate of the Chief Justice, that the validity of the state statutes was actually drawn in question under the contract clause of the Constitution, was but a further assurance of a fact already appearing. The motion to dismiss must therefore be denied.

3. At the foundation of the right to a reversal of this case is the question whether, conceding the validity of the exemption or commutation provision contained in the 21st section of the Mobile Company's charter of July 21, 1870, such exemption enured to the plaintiffs in error under their successive consolidations. It will be borne in mind that the existing Constitution of Mississippi was adopted November 1, 1890; that the present Yazoo Company was formed October 24, 1892

(nearly two years after the adoption of the Constitution), by the consolidation of the original Yazoo Company with the Louisville Company. By the act of August 8, 1870, the exemption contained in the 21st section of the Mobile charter was extended to the Memphis & Vicksburg Railroad, which was chartered the same day. This charter gave it power to consolidate its stock, property, and franchise with any other road upon such terms as might be consistent with the powers conferred upon the company. Twelve years thereafter, March 9, 1882, the Baton Rouge Company was incorporated with power to consolidate with any other company, and on March 3, 1882, the Memphis & Vicksburg Company was also authorized to consolidate. The same power had already been extended, February 17, 1882, to the Yazoo Company.

It is unnecessary to discuss the terms of the first consolidation of August 12, 1884, between the Tennessee Southern, the Memphis Company, the Baton Rouge Company, and the New Orleans Company, forming the Louisville, New Orleans, & Texas Company, since this was made prior to the adoption of the new Constitution of 1890. We are specially concerned with the articles of consolidation between the Louisville Company so organized, and the Yazoo Company, which were adopted October 24, 1892, and subsequent to the new Constitution. The question in that connection is whether such consolidation created a new corporation, or, in the language of § 180 of the Constitution of 1890, whether it was a "grant of corporate franchises," in which case, by the express language of that section, such new corporation became subject to the provision of the new Constitution. In their articles of consolidation these companies agreed "to and with each other, to unite, merge, and consolidate their several capital stocks, corporate rights, franchises, immunities, and privileges, and properties of every kind, real, personal, and mixed." The first article provided that "such consolidation shall be effected by uniting or merging the stock, property, and franchises of the party of the first part (the Louisville Company) with and into the stock, property, and franchises of the said the Yazoo & Mississippi Valley Railroad Company, without disturbing the corporate existence of the last-named company, or the formation of any new, distinct corporation, unless such result shall be necessary to give legal effect to this agreement; but, whatever may be the legal consequences of the consolidation herein provided for, this agreement is to stand and be effective." This article was evidently drawn in view of the decisions of this court upon the subject of merger and consolidation, and evinces a desire to avoid the legal results following from a consolidation of the two constituent companies into a new corporation, but, at the same time, expresses a doubt whether the agreement would not after all be construed to create a new corporation. These doubts were unquestionably well founded, and, if the effect of the agreement be in

law the creation of a new corporation, the expression of a wish that it should not be so construed is of course entitled to no weight. The final clause, that in any event the agreement shall stand and be effective, shows that effect should be given to all its stipulations, whatever be its legal consequences.

Subsequent articles provided that the corporate name should be the Yazoo & Mississippi Valley Railway Company; that the capital stock should be \$15,000,000; that the stockholders of either of the constituent companies should "have all the rights of a stockholder of the consolidated company, as fully as if new shares of the consolidated company had been issued and exchanged therefor; and, in case the consolidated company shall determine to issue new shares, such shares shall be exchangeable at par for the now outstanding shares of each of the constituent companies;" that all the rights, powers, privileges, immunities, and franchises of the constituent companies should pass to the consolidated company, which should be managed by a board of directors, whose names, for the purpose of the organization, were given.

Reading this agreement in connection with the charters of the several companies, and especially with that of the Memphis & Vicksburg Railroad Company of March 3, 1882, providing that "all of the companies so consolidating shall be merged into and become one company, and the company so formed by such consolidation shall be deemed and held to be a corporation created by the laws of this state," it is impossible to escape the conclusion that a new corporation was created with a capital stock of \$15,000,000, and that the stockholders of the constituent companies were to become stockholders of the new company, share for share, "as fully as if new shares of the consolidated company had been issued and exchanged therefor." Some question was made in the state courts whether the shares were actually issued in the new company. But the supreme court having found that they were, we accept that finding as conclusive. Power was expressly given to issue new shares, and the usual course of business would justify us in inferring that that was the method adopted. A new name was taken, which as none the less a new one by reason of the fact that it was the name of one of the constituent companies.

It cannot be doubted that under this agreement it was contemplated that the constituent companies should go out of existence, and that their officers should resign their trusts in favor of the officers of the new company; that their boards of directors should be supplanted by another board, the names of whose members were contained in the agreement; that the stock of the constituent companies should be surrendered and new stock taken therefor, or, in lieu of that, that the old stock should be recognized as the stock of the new company; that the road should be operated by men holding their commissions from the new company, and that the entire administration of

the functions of the constituent companies should be surrendered to the new corporation. In short, nothing was left of the constituent companies but the memory of their existence,—the mere shadow of a name. But the new company which took its place suddenly sprang into life with a new corps of officers and a full equipment for the successful operation of the road.

While, as stated in *Tomlinson v. Branch*, 15 Wall. 460, 21 L. Ed. 189, the presumption is that when two railroads are consolidated each of the united lines will be respectively held with the privileges and burdens originally attaching thereto, subsequent cases have settled the law that where two companies agree together to consolidate their stock, issue new certificates, take a new name, elect a new board of directors, and the constituent companies are to cease their functions, a new corporation is thereby formed subject to existing laws. But if, as was the case in *Tomlinson v. Branch*, one road loses its identity and is merged in another, the latter preserving its identity and issuing new stock in favor of the stockholders of the former, it is not the creation of a new corporation, but an enlargement of the old one. In such case it was held that where the company which had preserved its identity held as to its own property a perpetual exemption from taxation, it would not be extended to the property of the merged company without express words to that effect.

In the earliest of these cases (*Philadelphia & W. R. Co. v. Maryland*, 10 How. 376, 13 L. Ed. 461) it was held that a Maryland railroad whose charter contained no exemption from taxation did not acquire such exemption by consolidation with the Delaware & Maryland Railroad Company, whose charter exempted the road from taxation, except upon that portion of the permanent and fixed works which might be in the state of Maryland.

In *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. Ed. 757, an act of the legislature authorized the Central Railroad and the Macon Railroad to unite and consolidate their stock and all their rights, privileges, immunities, and franchises under the name and charter of the Central Railroad, in such manner that each owner of shares of stock of the Macon Road should be entitled to receive an equal number of shares of the stock of the consolidated companies. "Whether," said Mr. Justice Strong, "such be the effect [consolidation or amalgamation] or not, must depend upon the statute under which the consolidation takes place, and of the intention therein manifested. If, in the statute, there be no words of grant of corporate powers, it is difficult to see how a new corporation is created." It was held that the act did not work a dissolution of the existing corporations and the creation of a new company, since there was no provision for a surrender of the stock of the shareholders of the Central, and none for the issue of other certificates to them. In that case the road

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whose charter contained the exemption from taxation was preserved intact by the consolidation, and it was held that its exemption continued, while the other road was to go out of existence. As already stated, in the act authorizing the consolidation, in this case, of the Memphis & Vicksburg Railroad Company, there is an express provision that all the companies so consolidated shall be merged into and become one company, and held to be a corporation created by the laws of the state.

Other cases to the same effect, holding that the consolidation did not operate as a dissolution of the constituent companies, are *Chesapeake & O. R. Co. v. Virginia*, 94 U. S. 718, 24 L. Ed. 310; *Green County v. Conness*, 109 U. S. 104, 27 L. Ed. 872, 3 Sup. Ct. Rep. 69, and *Tennessee v. Whitworth*, 117 U. S. 139, 29 L. Ed. 833, 6 Sup. Ct. Rep. 645.

It may be observed that all these cases turn upon the question whether the new company inherited by consolidation certain privileges and immunities belonging to the constituent companies, or one of them, and that no question arose as to the applicability of a new constitutional inhibition intervening before the consolidation took place. This question, however, did arise in *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357, where it was held that a consolidation, under a statute of Ohio, of two or more railroad companies worked their dissolution, and that the powers and franchises of the new company thereby formed were subject to "be altered, revoked, or repealed by the general assembly" under a constitutional provision which took effect prior to the consolidation. The statute in that case expressly provided that the consolidated company should be a new corporation and subject to the constitutional provision. A like ruling was made under a similar statute of Maine in *Maine C. R. Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836. In *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185, two railroad companies were consolidated by an act of the legislature, which authorized the consolidation of their stocks, conferred upon the consolidated company full corporate powers, and continued to it the franchises, privileges, and immunities which the companies had held by their original charters. We held in that case that a new corporation was created, which became subject to the provisions of a statutory code adopted January 1, 1863, permitting the charters of private corporations to be changed, modified, or destroyed at the will of the legislature. The case was distinguished from *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. Ed. 757, as being a consolidation, instead of a merger. "Nor was it," said Mr. Justice Strong, "a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence as well as its corporate name. But the act authorized the consolidation of the stock of the two companies, thus making them one capital in place of two. It contemplated, therefore, that the separate capital of each company should go out of existence as the

capital of that company." To the same effect is *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 465, 28 L. Ed. 1055, 5 Sup. Ct. Rep. 529.

The latest declaration of this court upon the subject is found in *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. Ed. 450, 14 Sup. Ct. Rep. 592. In that case, a railroad corporation chartered in Missouri in 1857, with a provision that its property should be exempt from taxation for a period of twenty years after its completion, which took place in 1872, was consolidated with an Iowa corporation in 1870, under a general law of Missouri; and in 1886 the consolidated road was sold under a deed of foreclosure to purchasers, who conveyed it to an Iowa corporation. It was held that the act of the legislature of Missouri authorizing the consolidation, making one company of the two, whose stock should be consolidated upon such terms as might be mutually agreed upon, authorizing the adoption of a new corporate name, and for the exchange of the stock of the constituent companies for stock in the new company, and providing for the filing with the secretary of state of a copy of the consolidation agreement, which should be conclusive evidence of the consolidation and of the corporate name of the new company, was in effect the extinguishment of the prior companies and the formation of a new one; and that an intervening constitutional provision, adopted in 1865, prohibiting exemptions from taxation, was thereby let in and to be read as a part of the charter of the new company.

In view of the terms of the consolidating agreement, to which reference has already been made, and of the several acts of the general assembly of Mississippi authorizing these consolidations, we are of opinion that a new corporation was contemplated, and that, taken together, these several documents should be read as if they had expressly provided, with legislative sanction, for the formation of a new association. Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the legislature. Public policy in all the states has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational, and municipal purposes; but this list ought not to be extended except for very substantial reasons; and while, as we have held in many cases, legislatures may, in the interest of the public, contract for the exemption of other property, such contract should receive a strict interpretation, and every reasonable doubt be resolved in favor of the taxing power. Indeed, it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended, or that they have become inoperative by changes in the original constitution of the companies. In cases arising under the Mississippi Constitution of 1869, the method adopted in the charter of the *Mobile & Northwestern Company*, of commuting the taxes, was



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originally sustained under the theory that the provision of that Constitution declaring "the property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals," did not mean that it should be necessarily subjected to taxation, but that it might be exempted altogether by the legislature. *Mississippi Mills v. Cook*, 56 Miss. 40. But by the Constitution of 1890, "all existing charters or grants of corporate franchise under which organizations have not in good faith taken place at the adoption of this Constitution shall be subject to the provisions of this article," one of which was (§ 181) that "the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals."

It is true that in the act of March 9, 1882, authorizing the Baton Rouge Company to consolidate, in the act of March 3, 1892, authorizing the Memphis & Vicksburg Company to consolidate, and in the act of February 17, 1882, authorizing consolidations by the Yazoo Company, there were provisions that the consolidated companies should be entitled to the rights, privileges, franchises, property grants and immunities belonging to constituent companies, among which, under the name of immunities, might pass an exemption from taxation, as has been sometimes held by this court; and had not the constitutional provision of 1890 taken effect before the final consolidation of 1892, we might have been obliged to hold that the consolidated company was entitled to the commutation of taxes provided for in the 21st section of the charter of the Mobile & Northwestern Company. But it is scarcely necessary to say that, if the consolidation of 1892 resulted in a new corporation, it would come into existence under the Constitution of 1890, with the disabilities attaching thereto, among which is the provision that "the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals." Even if the legislature, in these several acts of consolidation, had expressly provided that the new corporation thereby formed should be exempted from taxation, the higher law of the Constitution would be interpreted as nullifying it to that extent.

A similar remark may be made with regard to the provision that these companies might consolidate upon such terms as they should agree upon. Obviously such terms must be consistent with the law existing at the time of the consolidation. It could never have been the intention of the legislature, and if it were it would be vain, to permit these companies to adopt such terms as they chose, if such terms were inconsistent with existing laws. The language indicated evidently refers to the method adopted for the consolidation, whether it was to be anything more than a simple merger, or whether it was to provide for a surrender of the stock of the constituent companies, the issue of new stock, the adoption of a new name, and the choice of a new board of directors. Under no circumstances

would they be interpreted as conveying rights to the new corporation which the legislature was incompetent to confer.

Great stress is laid by the railroad companies upon the fact that at the time these companies were incorporated the state was without credit, the treasury without money, the issue of state bonds in aid of public improvements forbidden by the Constitution, the levy of general taxes to assist in the building of the roads fruitless, the resources of the state having been exhausted by the civil war, which had left the community so poor that it was with difficulty the inhabitants could raise the taxes necessary for carrying on the government; that millions of acres of land were being abandoned and forfeited to the state for nonpayment of taxes and subsequently sold at incredibly low figures; that the paramount necessity was clearly the building of railroads to develop the resources of the state, and yet that the topography of the country was such that both the construction and the maintenance of the roads was difficult and expensive, and railroad enterprises promised very doubtful profits; that the lands along the river bottoms were waste and swamp, uncultivated and unexplored, and subject to annual inundations from the Mississippi; that the levees had been swept away again and again, and Congress asked for aid to rebuild them upon the ground of the impossibility of the state to do the work; that in this condition of affairs the best that could be done was to offer as a remuneration to vote taxes as a consideration for building the road; that these proposals were accepted and carried out in good faith; that the result has been to increase the value of property in portions of the state fully one hundred fold, and to immensely increase the revenues of the state and counties, and that under these circumstances the present repudiation of these contracts by the state, by pleading a technical incapacity to contract, is a gross breach of public faith, and should be discountenanced by the courts.

Potent as these considerations are, they address themselves to the legislative, rather than to the judicial, department of the government. The legislature is the proper guardian of the public faith, and in its action with respect to its own obligations we are bound to assume that it will be guided, not only by its present necessity for revenue, but by consideration of its possible future needs. But whatever policy the state may choose to adopt with respect to encouraging or discouraging the investment of capital from abroad, the duty of the courts is to declare the law as they find it, and avoid the discussion of questions of policy, which are clearly beyond their province. Certainly this court is not the keeper of the state's conscience. We have not thought it proper to inquire what was the answer to these charges. Doubtless they are sufficient, or at least are such as the legislature deemed to be sufficient, or it would not have passed the taxing acts of 1892 and 1894. While we have never hesitated to vindicate the right of individuals or corpo-

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rations to enforce the performance of lawful contracts as against subsequent legislation designed to impair them, we have always exacted as a condition that the contract was one which the legislature, or opposite party, had power to make under the Constitution, and that the other party was chargeable with knowledge of all its provisions in that connection. To enforce a performance, the plaintiff must also bring himself within the letter and spirit of the contract, and thus provide against any change in public sentiment which may render its performance obnoxious or unpopular.

Being of opinion that the consolidation in question, which took place nearly two years subsequent to the adoption of this Constitution, was a new grant of corporate franchises within the meaning of § 180, it follows that it became subject to the provisions of § 191.

The question how far the case of *Natchez, J. & C. R. Co. v. Lambert*, 70 Miss. 779, 13 So. 33, is applicable as *res judicata* upon the taxes involved in this case is a local question, upon which we are not called upon to express an opinion. We do not understand it to be pressed as ground for reversal.

The judgment of the Supreme Court is therefore affirmed.

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NOTES.**EXEMPTION FROM TAXATION—EFFECT OF CONSOLIDATION.**

In *Keokuk & Western R. Co. v. State of Missouri*, 152 U. S. 362, 60 Am. & Eng. R. Cas., N. S., 362, the court, per BROWN, J., in delivering the opinion, said: "In the numerous cases which have arisen in this court as to the effect of a consolidation upon the existence and status of the constituent corporations, it has been held that the question of the dissolution of such corporations (railroad) depended upon the language of the statute under which the consolidation took place; the presumption in each case being that each of the two lines of road will be held respectively to the privileges and burdens originally attaching thereto. *Tomlinson v. Branch*, 15 Wall. 460. If, upon the one hand, the identity of the prior corporations is preserved, an exemption from taxation, which one of them possessed, falls to that portion of the new corporation to which, under its former name, it had been attached. If, upon the other hand, the consolidation worked a dissolution of the prior corporations, their former privileges and franchises also ceased to exist. Thus, in the earliest of these cases,—*Philadelphia & W. R. Co. v. Maryland*, 10 How. 376,—it was held that the Baltimore & Port Deposit Railroad Company, whose charter contained no exemption from taxation, did not acquire such exemption by consolidation with the Delaware & Maryland Railroad Company, whose charter exempted the road from taxation, 'except upon that portion of the permanent and fixed works which might be in the state of Maryland.'"

## Notes

## RIGHT TO EXEMPTION LOST BY CONSOLIDATION.

**Where Act Provides for Merger.**—Where the purpose and effect of the consolidating act is to provide for a merger of the taxable corporation into the one having the exemption, the consolidated corporation will hold the franchises of the taxable company, subject to taxation. *Central R. & B. Co. v. Georgia*, 92 U. S. 665; *Tennessee v. Whitworth*, 117 U. S. 139. See also, *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359; *Cheraw & Salisbury R. R. Co. v. Commissioners of Anson*, 88 N. Car. 519, 17 Am. & Eng. R. Cas. 431.

Where two roads are consolidated, one of which has an exemption from taxation, in such a way as to extinguish the old company and form a new one, the exemption, in one of the old charters, from taxation, does not pass to the new company. *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. Rep. 592.

The charter of a railroad company being given, exempting such company from taxation under certain circumstances, and thereafter a constitution being enacted in the state, according to which no corporation should be specifically relieved of taxation, the railroad company, upon being consolidated with another railroad, thereby losing its identity, should be liable for all the pains and penalties imposed by the respective charters of the several companies so consolidated. By the subsequent absorption of the railroad so exempted from taxation with another not so exempted it must be presumed that the original company, in entering into the consolidation, did so in full view of the existing law, and with the intention of forming a new corporation. *St. Louis, etc., R. Co. v. Berry*, 113 U. S. 465.

**Rights Governed by Act Allowing Consolidation.**—The Michigan Southern R. R. Co. was established by the State of Michigan under a special charter which defined the basis on which it was to be taxed. The state afterwards authorized it to consolidate with the Northern Indiana R. R. Co., with no change in the basis of taxation by the same, and a general railroad law was passed at about the same time. This law and very similar acts afterward passed provided that "every corporation formed" thereunder should be taxed at a certain rate. The Michigan Southern & Northern Indiana Co. meanwhile became part of the Lake Shore & Michigan Southern Ry. Co. under consolidation agreements with corporations in other states, through which the route of the consolidated company lies and in which its business is done. A writ of *mandamus* sought for by the state treasurer to compel the auditor general to assess the company under the general law was denied; it is not a corporation framed under that law and taxes are properly assessed upon the basis fixed by the original special charter. *State Treasurer v. Auditor General (Mich.)*, 3 Am. & Eng. R. Cas. 565.

The 17th section of the charter of the Petersburg Railroad Company which exempted the property of the company from taxation, has been repealed by the act of April 2, 1853, which united it with the Greenville and Roanoke Railroad Company; which act was accepted by the company, and the property of the said company is now subject to taxation. *Petersburg v. Petersburg R. Co.*, 29 Gratt. 773.

**Status of Corporation Formed by Consolidation as to Constitutional Provisions Respecting Taxation.**—A new railroad company formed by

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consolidation comes into existence precisely as if it had been organized under a charter granted at the date of the consolidation, and is subject to any then existing constitutional provision respecting taxation and exemption therefrom. *Keokuk & Western R. Co. v. State of Missouri*, 152 U. S. 301, 60 Am. & Eng. R. Cas. 362.

An act authorizing railroad corporations to consolidate, and providing that the companies so formed by consolidation shall be entitled to the same franchises and privileges under the laws of the state as if consolidation had not taken place, does not extend to the new company immunity from taxation enjoyed by one of the constituent companies under its charter, where, by the constitution existing at the time of the consolidation, exemption from taxation was expressly prohibited except in certain specified cases not including the one in question. *Keokuk & Western R. Co. v. State of Missouri*, 152 U. S. 301, 60 Am. & Eng. R. Cas. 3621.

A new corporation by consolidation being created after the adoption of the constitution of 1865, the legislature had no power to grant it immunity from taxation; and an exemption from taxation enjoyed by the consolidating company before the consolidation did not and could not pass to the new one. *State v. Keokuk & W. R. Co.*, 41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 290.

Although the corporate rights and privileges formerly belonging to the Baltimore & Susquehanna Railroad Company were, by the express terms of the Md. Act of 1854, ch. 250, vested in the consolidated company, and the provisions of the act of 1827, ch. 72, incorporating the original company, were to that extent embodied in, and re-enacted by, said act of 1854, yet the rights and privileges thus conferred became new and special grants to the consolidated company, dating from the period when the said act of 1854 went into operation. The Northern Central Railway Company was created a new corporation by virtue of the act of 1854, and it was under that act alone that it derived all its franchises, rights, and immunities. As the Maryland constitution of 1850 was in force when the act of 1854—under which the latter was incorporated—went into effect, the legislature had the right to repeal or revoke the exemption from taxation claimed under said act. *State v. Northern C. R. Co.*, 44 Md. 131.

**One Company Absorbing the Road of Another.**—The privilege of exemption from taxation granted to a railroad company with respect to its main road does not attach to the road of another company transferred to and absorbed by it; nor does such transfer and absorption amount to the extension of its main road so as to bring it within the exemption privilege. *Wilmington & Weldon R. Co. v. Alsbrook* (U. S.), 53 Am. & Eng. R. Cas. 687.

**Consolidation of Domestic and Foreign Company.**—Charter exemption of a railroad company from taxation for a fixed period does not pass to a company formed by an authorized consolidation of the corporation so exempted and a railroad corporation of another state. *Keokuk & Western R. Co. v. State of Missouri*, 152 U. S. 301, 60 Am. & Eng. R. Cas. 362.

## Notes

## RIGHT TO EXEMPTION NOT LOST BY CONSOLIDATION.

In *Tennessee v. Whitworth*, 117 U. S. 139, the court, per WAITE, C. J., in delivering its opinion, said: "As early as 1850, before either the charter of the Tennessee & Alabama Co. or that of the Central Southern Co. was granted, this court said in *Philadelphia, Wilmington & Baltimore R. Co. v. Maryland*, 10 How. 376, 393, speaking by MR. CHIEF JUSTICE TANEY, that a statute which authorized the union of two railroad companies, and secured to the united company the 'property, rights, and privileges which that law, or other laws, conferred on them [the separate companies], or either of them,' extended to the united company an exemption from taxation in the charter of one of the uniting companies, and this although it was at the same time said that 'the taxing power of a state is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms.' This has been expressly reaffirmed in *Tomlinson v. Branch*, 15 Wall. 460; *Humphrey v. Pegues*, 16 Wall. 244; *Southwestern R. v. Georgia*, 92 U. S. 676; and the correctness of the decision was recognized in *Central R. & Banking Co. v. Georgia*, 92 U. S. 665; *Morgan v. Louisiana*, 99 U. S. 217; *Railroad Companies v. Gaines*, 97 U. S. 697, 711; *Railroad Co. v. Georgia*, 98 U. S. 359, 360; *Railroad Co. v. Hamblen*, 102 U. S. 273, 277; *Railroad Co. v. Commissioners*, 103 U. S. 1, 4; *Wilson v. Gaines*, 3 U. S. 417; *Louisville & Nashville R. Co. v. Palmes*, 109 U. S. 244, 253; *Chesapeake & Ohio R. Co. v. Miller*, 114 U. S. 176, 185."

In *Natchez, J. & C. R. Co. et al. v. Lambert*, 70 Miss. 779, it was held that where a railroad company was by statute relieved from the payment of taxes for a certain period until its earnings exceeded a certain percentage, and the company by statutory permission consolidated with another company, and the consolidated company again consolidated with still another company, the latter was entitled to the exemptions originally granted.

**Where All Rights and Privileges Granted to Successor.**—A grant of all the "rights and privileges" of one railroad company to its successor includes immunity from taxation which the former had enjoyed under its charter, notwithstanding the use of the words "rights, privileges, immunities, or exemptions" in the state constitution, as if an immunity was something different from a right or privilege. *Louisville & N. R. Co. v. Gaines*, 2 Flipp. (U. S.) 621, 3 Fed. Rep. 266; *Memphis & C. R. Co. v. Gaines*, 97 U. S. 711.

**Where Act Creates Community of Interest.**—Lands used by the prosecutors for the necessary purposes of the railroad company are exempt, although the title is in the Delaware and Raritan Canal Company, for, by the act of Feb. 15, 1831, which consolidates these companies, there is an absolute community of interest between them, and so far as taxation is concerned, it matters not to which company the estate may have been conveyed. *State v. Woodruff*, 36 N. J. L. 94, 12 Am. Ry. Rep. 424.

**Consolidation of Corporations of Different States.**—A railroad company formed by the consolidation of companies of different states is held in law to be a distinct corporation in each state; and the charter exemption from taxation of one of the companies, unless its abrogation was made a condition of the right to consolidate, vests in the consolidated company. *Branch v. Charleston*, 92 U. S. 677; *Delaware R. Co. v.*

## Notes

Cox, 18 Wall. U. S. 206; Chesapeake & C. R. Co. v. Virginia, 94 U. S. 718; Philadelphia & C. R. Co. v. Maryland, 10 How. (U. S.) 376.

**Where Shares of Both Companies Were Exempt.**—Where two railroads whose shares of stock are exempt from taxation, consolidate and issue stock, right of exemption passes into the new shares. *Tennessee v. Whitworth*, 117 U. S. 139, 22 Am. & Eng. R. Cas. 211.

**Where All Rights Pass to Purchaser.**—A statute providing that "all rights" as to a line of railway which "are and have been legally vested" in one corporation shall pass to another corporation upon a sale by one to the other, passes a right of exemption from taxation, where such right exists in the vendor company at the time of sale. *Atlantic & G. R. Co. v. Allen*, 15 Fla. 637.

### EXEMPTION DOES NOT EXTEND TO PROPERTY OF THE OTHER CONSTITUENT COMPANY.

The consolidation of the rights, privileges, franchises, and properties of two or more railroad companies into one, where there is no provision of the statute or constitution to the contrary, leaves the different portions of the road, so formed into one, subject to the same rules of taxation that existed before the consolidation. That part of the new line which was exempt will continue to be exempt, and that part which was subject to taxation will continue subject to taxation. *City of Charleston v. Branch* (U. S.), 15 Wall. 470; *Chesapeake & Ohio R. R. Co. v. Virginia*, 94 U. S. 718; *Central R. R. & Banking Co. v. Georgia*, 92 U. S. 665; *Bailey v. New York Central R. R. Co.* (U. S.), 22 Wall. 604; *Branch et al. v. City of Charleston*, 92 U. S. 677; *Delaware R. R. Tax Case*, 85 U. S. 206; *Minot v. Phila. W. & B. R. Co.* (U. S.), 18 Wall. 206; *Tomlinson v. Branch* (U. S.), 15 Wall. 460; *Phila. & Wilmington R. R. Co. v. Maryland* (U. S.), 10 How. 376; *Evansville, H. & N. R. Co. v. Com.*, 9 Bush (Ky.), 438; *Mich. S. & N. Ind. R. Co. v. Auditor General*, 9 Mich. 448; *Natchez, J. & C. R. Co. v. Lambert*, 70 Miss. 779, 13 So. Rep. 33; *State v. Keokuk & W. R. Co.*, 41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 290; *Wilmington & W. R. Co. v. Alsbrook*, 110 N. Car. 137, 14 S. W. Rep. 652; *State v. Woodruff*, 36 N. J. L. 94; *State v. Com'r Railroad Taxation*, 37 N. J. L. 240; *Knoxville & Ohio R. R. Co. v. Hicks*, 1 Tenn. Leg. Reports, 338.

**Leased Lines.**—In *Lake Shore & M. S. R. Co. v. City of Grand Rapids* (Mich.), 60 N. W. Rep. 767, it was held that the exemption of a railroad company from taxation by a special act, cannot be extended to lines which the company may thereafter lease and operate, and which were organized under the general railroad laws of the state.

### EXEMPTIONS FROM TAXATION—RIGHTS OF PURCHASER OF RAILROAD AT FORECLOSURE SALE.

**General Rule.**—See *Baltimore, etc., Ry. Co. v. Mayor*, etc., of Ocean City (Md.), 14 Am. & Eng. R. Cas., N. S., 195, and *note*, 195.

Exemption from taxation granted to a railroad corporation is a personal privilege, incapable of transfer, and does not pass to the purchaser of the road under a mortgage. The exemption from taxation granted by charter to the Arkansas Midland R. Co., was lost by the subsequent consolidation of that company with the Little Rock & Helena R. Co.,

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and forming the Central R. Co. *Arkansas Midland R. Co. v. Berry*, 44 Ark. 17; *Memphis & L. R. R. Co. v. Berry*, 41 Ark. 436.

A railroad company, having obtained its charter under a general law, which the constitution of the state granting it declares to be subject to legislative alteration and amendment, and its certificate of incorporation being the conveyance to it by the name it has chosen, as a purchaser at a judicial sale and recorded as required, does not thereby succeed to the exemption from taxation accorded to the company to which it has succeeded by such purchase, so as to put it beyond the legislative power to subject its property to taxation thereafter without impairing the obligation of contracts. *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176.

A mortgage of the charter of a corporation, made in the exercise of a power given by statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation: if it confers any right of corporate existence upon them, it is only a right to reorganize as a corporation, subject to laws, constitutional and otherwise, existing at the time of the reorganization. The privilege of being exempt from taxation does not pass to the purchaser at such foreclosure sale. *Memphis, etc., R. Co. v. R. Com'rs*, 112 U. S. 609.

By the sale and conveyance of the "property and franchises" of a railroad company in a suit by the state to enforce a statutory lien, immunity from taxation conferred by the charter of the company does not pass to the purchaser. *Picard v. East Tennessee, Virginia & Georgia R. Co.*, 130 U. S. 637, 39 Am. & Eng. R. Cas. 551.

**When Right to Exemption Implied.**—See *note*, 14 Am. & Eng. R. Cas., N. S., 199.

**When Right Not Implied.**—See *note*, 14 Am. & Eng. R. Cas., N. S., 199.

**Conferred by Decree.**—See *note*, 14 Am. & Eng. R. Cas., N. S., 200.

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LOUISVILLE & N. R. Co

*v.*

QUICK.

(*Supreme Court of Alabama, April 17, 1900.*)

[28 South. 14.]

**Carrying Passenger Past Destination—Pleading—Elements of Damage—Motion to Strike.**—Where, in an action against a carrier for damages resulting from carrying plaintiff beyond her destination, a count in the complaint contains averments of both proper and improper elements of damage, a motion to strike the whole will not be granted.

**Same—Elements of Damage.**—In an action against a carrier for carrying plaintiff beyond her destination, the anxiety and physical injury caused by her exposure to rain and cold after being returned to her destination are not proper elements of damage.



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**Same—Same.\***—Where plaintiff is carried beyond her destination by no fault of her own, but by failure of the carrier's agent to perform his duty, the company is liable in damages for whatever vexation, anxiety, and physical injury she may have suffered in consequence of such wrongful act in returning to the point of destination.

**Same—Right to Rely on Conductor's Promise to Notify.**—Where, in an action against a carrier for carrying plaintiff beyond her destination, the evidence tended to show that the conductor had promised to inform her when the train arrived at her destination, and that she had relied on this promise, a charge that, if this was true, plaintiff was not obliged to listen for or depend on the call of the station by the brakeman, is correct.

**Same—Same—Conflict in Evidence.**—Where, in an action against a carrier for carrying plaintiff beyond her destination, there was a conflict in the evidence as to whether the defendant's conductor had promised to notify her when the train arrived at her destination, it was proper to refuse a charge that the jury must find for the defendant.

Appeal from city court of Birmingham; William W. Wilkerson, Judge.

Action by Malinda Quick against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This action was brought by the appellee, Malinda Quick, against the Louisville & Nashville Railroad Company, to recover damages for defendant's carrying her beyond her place of destination. The complaint contained two counts. Case Stated. In the first count it was averred that the plaintiff who was very old and infirm and not accustomed to travel on railroad trains, and was not familiar with the way in which passengers were informed about disembarking from trains on railroads, took passage on one of the defendant's trains, with a ticket for Birmingham as her place of destination; that she told the conductor in charge of the train that she wished to get off at Birmingham and informed said conductor that she was old and infirm and not acquainted with the ways of travel on railroad trains; that said conductor told her to remain on the car in which she was riding, and that on its arrival at Birmingham he would inform her of the fact and assist her to alight from the train; that upon the train arriving at Birmingham, the conductor wholly failed to inform her that she had reached her place of destination, and that she did not know until after her train had left Birmingham that that was the place where she wished to get off; that after being carried past Birmingham, she was put off of said train at Warrior, a station on the line of defendant's road, and in obedience to directions she waited there until the train going south to Birmingham reached said station, and then took passage upon said train; that upon being informed by a

\*See extensive note, 10 Am. & Eng. R. Cas. 259 *et seq.*

passenger that she was at Birmingham, she disembarked from said train. The first count then continued in its averments as follows: "In the meantime, her son, who had met the train upon which she had first come to Birmingham, not seeing her in the depot or alight from said train, had returned home. She did not know where her son lived, and after remaining in the depot at Birmingham for quite a while, she was put into a hack or other vehicle by a stranger and the driver told to carry her until he could find her son's home. The weather was exceedingly cold and wet, and she was driven a long distance, and wandered from place to place in the city of Birmingham, and never reached her son's home until about dark. In going to his house she became thoroughly drenched with rain. After she found that she had left Birmingham, she was very much frightened and was very anxious and suffered a great deal of mental worry and anxiety and continued to suffer from anxiety and worry until she reached the home of her said son. On account of her exposure to the cold and rain she was made sick and contracted rheumatism and other ailments from which she has continued to suffer up to this time. She has had to spend money in attempting to effect a cure of her ailment and suffered a great deal of pain and anxiety, and has been permanently diseased because of the facts aforesaid."

The second count was in substance the same as the first in its prefatory averments, except that it averred that the plaintiff informed the conductor that she was exceedingly old, infirm and deaf, and also informed the conductor that her son would meet her at the depot in Birmingham, and that she was wholly without money or means, and after finding that she had passed Birmingham, she became greatly worried and frightened. After making such prefatory averments, the second count then continued as follows: "She did not know where he [her son] resided, and she was at the depot without money or means, and suffered great anxiety not being able to learn where he lived and having no means with which to hire a conveyance to carry her to his home. After wandering about the depot for a while, a stranger, seeing her great distress, hired a vehicle for her and told the driver to carry her to her son's if his home could be found, and if not to return her to the depot; she got into the conveyance provided for her by the said stranger and traveled for a long while and until night hunting for the home of her said son. The weather was exceedingly cold and disagreeable, and before reaching the home of her son a heavy rain fell in which she was thoroughly drenched and made wet. She has suffered great mental anguish and anxiety and by reason of the exposure and worry she was made sick and contracted rheumatism and other ailments by which she has been afflicted ever since, and from which she has greatly suffered and has been permanently injured, and has spent considerable sums of money for nursing, medicines and medical attendance in attempting to effect a cure of her said ailments."

The defendant moved to strike from the first and second counts respectively, the averments which are quoted above, upon the grounds that the matters alleged in said parts of each of said counts were irrelevant and immaterial, and that the damages sought to be recovered from the facts alleged therein were remote and not proximate damages. This motion was overruled, and the defendant duly excepted. The defendant pleaded the general issue, and by special pleas the contributory negligence of the plaintiffs. The trial was had upon issue joined upon these pleas.

The evidence for the plaintiff showed that she was an old lady about 78 years of age, and she boarded the train at Careyville, Fla., a point about 100 miles east of Pensacola, and for her destination had Birmingham, Ala. That upon getting to Pensacola junction, she took passage in a car on the defendant's road where she remained until she got off by the direction of the conductor at Warrior, Ala. The plaintiff, as a witness in her own behalf, testified that at Pensacola junction, the conductor put her on the Louisville & Nashville train, which runs thence through Montgomery and Birmingham to points north of the latter place, and told the conductor of that train that there was an old lady he desired him to take in charge; that when the latter conductor came to get her ticket, he said, "You want to go to Birmingham, do you?" and plaintiff told him, "Yes;" when the conductor said to her: "Stay right here, it matters not who gets on, or who gets off," and plaintiff said: "I will be here when you come; I will stay here," to which the conductor replied, "All right." She testified that the conductor did not say he was coming, he only said "All right," and this happened, as she stated, a short while after they left Pensacola junction.

The evidence shows, without conflict, that the conductor on the defendant train, which brought the plaintiff to Montgomery, did not go further and have charge of the train, beyond the latter point, but that there was a change of conductors at that point; and another and different conductor from the one that brought the train into Montgomery took charge of and carried the train on to Birmingham and Nashville, and there is no evidence that the conductor from Flomaton to Montgomery ever communicated anything that passed between him and the plaintiff to the conductor who had charge of the train from Montgomery to Birmingham.

G. M. Adams was the conductor from the latter point to Nashville. He testified that he took charge of the train at Montgomery, and the other evidence was to the same effect; that the train was on time and they reached Birmingham at 12:01 and left at 12:25, having remained there 24 minutes; that there was nothing to prevent the plaintiff from getting off the train at Birmingham, while it was standing there under the shed; that as they approached Birmingham the flagman called out, "Birmingham, plenty of time for dinner," in a tone

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of voice loud enough to be heard distinctly all over the coach; that he did not know the plaintiff was deaf, as she did not tell him she was, nor did she tell him that her son was expected to meet her at the depot; that she did not ask him to inform her when they reached Birmingham, nor to aid her in getting off, or give her any information; that he discovered, after leaving Birmingham, by being so told by the flagman, that the plaintiff was on the train, when he told her that he could not put her off before reaching Warrior, so as she could be properly taken care of, as it was raining very hard, and when they reached Warrior he put her off with instructions for her to be sent back to Birmingham on the down train, which was due then at 2:20, and this was done, carrying her to the latter place at 3:40. The evidence for the plaintiff further tended to show that upon the day she arrived at Birmingham she telegraphed her son of her expected arrival and asked him to meet her at the station; that in response to said telegram her son was at the depot in Birmingham waiting for her, but according to the rules and regulations of the defendant he was not allowed to enter within the gates, and after waiting 20 or 30 minutes for her to disembark from the train, without seeing her, he left the depot. The evidence for the plaintiff further tended to show that upon the train arriving at Birmingham, she did not hear the station announced by either the flagman or the conductor, and she remained in the car during the time the train was at Birmingham, and that after her return from Warrior where she had taken the down train, when she arrived in Birmingham her son was not at the station to meet her, and she was without means and food; that after remaining in the waiting room a long time, a stranger to her hired a hack and instructed the hackman to take her to the home of her son; that it was very cold and raining and that one of the window glasses of the hack was broken; that the hackman did not know where her son lived, and in trying to find his residence, he drove about the city of Birmingham about 2 or 3 hours, through the cold and rain and finally found the house of her son, just before dark, and that by the exposure and riding about the city trying to find her son's house, she contracted a severe cold and rheumatism.

There was a conflict in the evidence as to whether the plaintiff informed the conductor who had charge of the train from Montgomery to Birmingham that she was old, infirm and not accustomed to travel on railroad trains, and as to whether she requested this conductor to advise her when they arrived at Birmingham, and whether this conductor promised to inform her when they arrived at Birmingham, and to assist her to alight from the train.

There were many exceptions reserved to the rulings of the court upon the evidence, but under the opinion on the present appeal it is unnecessary to set out the facts pertaining thereto.

The defendant separately excepted to the following portions:

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of the court's oral charge, which are numbered to correspond with the assignments of error based upon their being given by the court: (35) "But if the conductor had promised to come to her when the train reached Birmingham, she had a right to rely on that promise, and that he would come, and she was not, under those circumstances, obliged to take notice of the fact that the train had got to Birmingham, and she was not obliged to listen at or depend upon the call of the brakeman when the train reached Birmingham, as a passenger would be required to do if the passenger had no assurance at that time from the conductor." (36) "And so though the train got to Birmingham and stopped here, and though the brakeman or conductor may have—the brakeman may have—called out 'Birmingham,' thereby giving notice to the passengers of the fact the train was at Birmingham, then if she—relying upon his promise to come to her at that time, if he did make such promise—failed to hear the brakeman call out the station of Birmingham, why she would be entitled to recover, because she was not obliged, if the conductor promised to come to her at Birmingham, she had a right to rely on that promise and wait in her seat until he came, and she was not obliged to listen to the brakeman or listen at the call of the station, but might simply expect him to come and do what he promised to do."

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If you believe the evidence you must find for the defendant." (2) "If you believe the evidence you must find for the defendant under the first count of the complaint." (3) "If you believe the evidence you must find for the defendant under the second count of the complaint." (4) "If you believe the evidence you must find that the conductor who had charge of the train when it reached Birmingham was not the conductor who made to the plaintiff the promises alleged in the complaint, if from the evidence you believe that any such promises were made to the plaintiff."

There were verdict and judgment for the plaintiff, assessing her damages at \$1,250. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Thos. G. & Chas. P. Jones and Alex. C. Birch, for appellant.

Lane & White and John T. Shugart, for appellee.

Haralson, J. 1. It is often difficult to determine what is and what is not the proximate cause in contemplation of law. Mr. Cooley lays down the rule for its determination to be: "If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some inter-

vening cause, from which last cause, the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the claim of events at the point beyond which experience and observation convince us we cannot press our inquiries safely," etc.; and he adopts what Addison says on the subject: "If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and damage are not sufficiently conjoined and concatenated as cause and effect to support an action." Cooley, Torts, p. 73, § 69. Mr. Bishop in stating the same principle says: "If, after the cause in question has been in operation, some independent force comes in and produces an injury, not in its natural or probable effect, the author of the cause is not responsible." Bish. Noncont. Law, §§ 41, 42; Whart. Neg. § 75; Shear. & R. Neg. § 26. Again it has been held, that "the cause of an injury is in contemplation of law that which immediately produces it in its natural consequences; and, therefore, if a party be guilty of an act of negligence which would naturally produce an injury to another, but before such injury actually results, a third person does some act which is the immediate cause of the injury, such third person is alone responsible therefor, and the original party is not responsible, even though the injury would not have occurred but for his negligence." 16 Am. & Eng. Enc. Law, 436, 446, note. Many cases are referred to by these authors, as illustrative of these rules, and in *Lewis v. Railway Co.*, 54 Mich. 55, 19 N. W. 744, Cooley, C. J., discusses at length and refers to many adjudged cases on the subject, in a case similar to the one we have before us; and this is the doctrine of this court. In *Railway Co. v. Mutch*, 97 Ala. 194, 11 South. 894, the principles above referred to and quoted were there also quoted and approved, the court, by Stone, C. J., adding: "The authorities from which we have quoted are everywhere regarded as standard. What they assert is but the condensation of the utterances of a very great number of the highest judicial tribunals, wherever the principles of the common law prevail;" citing a number of these authorities. The same principles are recognized in our late case of *Armstrong v. Railway Co.*, 26 South. 349, where it is said: "The logical rule in this connection, the rule of common sense and human experience as well, \* \* \* is that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or

not, would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind;" citing 1 Shear. & R. Neg. § 29. See, also, Railroad Co. v. Arnold, 80 Ala. 600, 2 South. 337.

2. It is clear under these rules, that much of that part of the first count in the complaint which defendant moved to strike was liable to be stricken. The matters, in the main, there set up, as causing plaintiff's damage, were independent causes of injury, which did not, according to the ordinary course of events follow from the wrong complained of, and were not so conjoined therewith as to support the action. The motion to strike, however, was directed to the whole of the portion objected to, and in order to be sustained the whole should be bad. 3 Brick. Dig. p. 705, §§ 67, 68. The part moved to be stricken contained the clause: "After she found that she had left Birmingham, she was very much frightened and was very anxious and suffered a great deal of mental worry and anxiety and continued to suffer worry and anxiety until she reached the house of her said son." This averment is made independent of its connections, and set up a proper element of damage, as the direct result of being carried beyond her destination. Railroad Co. v. Dancy, 97 Ala. 340, 11 South. 796. On this account, the motion to strike was properly overruled.

3. The defendant moved also to strike the concluding portion of the second count in the complaint beginning with the words "She did not know where he resided," etc., down to and including the words "a cure for her said ailments."

Same—Elements  
of Damage.

This portion of the complaint sets up improper elements of damage, as being too remote and not proximate to the wrong complained of, and the motion to strike should have been granted.

4. There are very many exceptions to the admission of evidence against defendant's objections, to consider which in detail would prolong, without advantage, this opinion to an extraordinary length. From the principles heretofore announced, the learned judge of the city court will be able to apply the law in the admission and rejection of evidence on another trial. We may say, generally, that if plaintiff was carried beyond her destination by no fault of her own, but by

Same—Same.

failure of the company's agent to perform his duty in this respect, the company is liable in damages (25 Am. & Eng. Enc. Law, 1112, and authorities there cited); and in such case, whatever delay, deprivation, vexation, anxiety and suffering of mind the plaintiff experienced and which were consequent upon such wrongful act, and if any harm or injury was occasioned thereby to her health, in returning to the point of her destination, it should properly enter and be considered as elements of recoverable damage; but what happened to her afterwards, in going to her son's house, and how that trip affected her, is foreign to the case.

5. The evidence tends to show that the conductor who made to plaintiff the alleged promise to put her off at Birmingham brought the train no further than Flomaton, 180 miles south of Montgomery, and that the car in which she was riding was brought by the Mobile train, in charge of a different conductor, to Montgomery, where the crews were again changed, and a new conductor, by the name of Adams, there took charge and carried the train to Birmingham and points north of that place. Adams testified, he knew nothing about the plaintiff, had no conversation with her, did not know of her alleged infirmities, and was not informed and knew nothing of what had passed between her and any other conductor. He and the brakeman, Webb, both swore that on arrival of the train at Birmingham, as it was approaching, and after it had stopped, the station was distinctly and audibly announced, and passengers told they would have twenty minutes for dinner; that the train remained there 24 minutes, and departed on its north-bound run. He did not discover that plaintiff was on the train until he arrived about Boyle's station, a few miles above Birmingham, and carried her to Warrior, the next station, and put her off, to which she made no objection, with directions for her to be brought back to Birmingham on the south-bound train, which was done, arriving there at about 3:40 p. m. He also testified that Warrior was the first station at which he could properly put her off.

The plaintiff testified that the conductor from Pensacola told her, "If you want to go to Birmingham, you sit right in here, and don't get off," and she replied, "I will be right here when you come to put me off;" that he never came back any more until between Birmingham and Newcastle; that she never heard Birmingham called out on arrival there; that the conductor did not say anything about letting her know when they got to Birmingham, and that when she told him, she wanted him to put her off, he replied, "All right." She also testified, that she had this conversation with the conductor in the night after she changed cars at Flomaton, and between there and Montgomery, and answered further, that the man pointed out to her,—evidently referring to Conductor Adams who had been examined,—to use her own language, "looked like the conductor who told me to sit down where I was until he came and notified me, it made no difference who got off."

Under the pleadings in the case, and the evidence, we can discover no fault with those portions of the court's general charge made the basis of assignment of error 35 and 36.

Nor was there error in refusing to give the several charges requested by defendant, as there was conflict in the evidence upon which they were respectively based.

It may be well to add, that whether the conductor's promises as alleged to have been made to plaintiff, to put her off at

Same—Right to  
Rely on Con-  
ductor's Promise  
to Notify.

Same—Same—  
Conflict in  
Evidence.



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Birmingham, were binding on the company or not, and whether he was bound to cause such promises, if made, to be communicated to his successors, if there was a change of conductors before plaintiff reached her destination, and that each was bound to fulfil these promises, are questions concerning which we express no opinion.

The argument of counsel for plaintiff excepted to by defendant, in some of its phases was not legitimate; but as it will not likely be indulged on another trial, we deem it unnecessary to comment on it.

For the errors indicated, the judgment must be reversed and the cause remanded.

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COBURN

v.

PHILADELPHIA, W. &amp; B. R. Co.

*(Supreme Court of Pennsylvania, Feb. 18, 1901.)*

[48 Atl. 265.]

**Injury to Passenger—Absence of Car Step—Contributory Negligence.**  
—A passenger on a car which should have three steps, but has only the first two, is guilty of contributory negligence where he steps down, without looking, while the car is approaching a station, to where the step should have been.

Appeal from court of common pleas, Philadelphia county.

Action by Walter G. Coburn against the Philadelphia, Wilmington & Baltimore Railroad Company for personal injuries. Judgment for defendant, and plaintiff appeals. Affirmed.

Part of the charge, the parts complained of being inclosed in brackets, and the first three assignments of error, are as follows:

“It is apparent that the claim of the plaintiff here is that he was hurt by reason of the fact that the last step—what they call the third step—of the car on which he was was weak, and broke from under him, or was not there at all. That, I think, is all there is to it on his side. He started to go down that step, he says, and when he got on the third step it either went from under him or was not there, and he went through, and the car ran over him. That is his side of the case. The other side of the case is that the car step was there; that the man went down the steps as the car slowed up, attempted to get off, and fell. Now, both of these things may be true. I do not mean it exactly that way, but I

mean that either of these things are true,—that is the better way to put it. It is probable that the step may have given away and pitched him down. It is possible, and quite probable, a man might attempt to jump a train as it approached a station, goes down, and is run over. Both things have happened, and, I suppose, will happen. Which happened in this case? You, of course, are aware, and the plaintiff has said so himself, that the only thing he complains of in regard to the railroad is that they did not have a safe step for him to step on. If you are of the opinion that that step was there, where is the fault of the railroad? Of course, there is no fault in the railroad if that is so; and if you believe that that car had the three steps, safe to step on, that is the end of the case, and your verdict should be for the defendant. \* \* \*

It all comes down to the one thing, was that safe step there for him to get on and off of? The defense is that it was there, and that the accident was due to his effort to get off the car; and, to read a little between the lines,—that is, to draw the manifest inferences which are to be drawn from the testimony,—the defense evidently is that, in their opinion, this man had bought a ticket for another station further on; that he did not want to stop there; that he wanted to get off in a hurry, and say a word to the station agent, and get back again before the train went off; and therefore that he was on the step when the train came to a stop. That is, to sum up, to run off to say something to the station agent,—to say a word to the station agent,—and get on again, and go to another station, and naturally fell. That is the defense, there is no doubt about that. No witness said he intended to do that, but that is the manifest inference that the defendants have endeavored to persuade you is the true inference to be drawn from the facts of the case as they present it. The other side, as I have already said, say, to present it equally plain, that this man, a passenger, when he got the announcement, 'All out for Ridgely!' went to the platform, looked to see or saw that the steps appeared perfectly safe, that the third step appeared to be there, and he walked down the steps slowly as the train approached the station, and, when he put his foot where he thought the third step was, down he went, and was run over. Now, first, which way do you believe the accident happened?"

"Was this the attempt of a man to get off a train before it stopped, and was he thus hurt, or was it the case of a man going down on the platform or step, which was apparently safe, and the platform or step giving away from under him? Now, if you come to the conclusion, and your deliberate conclusion is, that these car steps were all right, all in place and safe, and that he either fell off or attempted to get off the moving train, and was thus hurt, it is your bounden duty to render a verdict in favor of the defendant. But suppose you come to the conclusion that it did not happen that way,—that it happened by the reason of his walking down and step-

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ping through a step, or upon a step that broke from under him, or stepping into a place where there was no step; then what? Then, gentlemen, you must consider something else; for it does not necessarily follow that that entitles him to a verdict. It may or it may not. It is a passenger's duty, if he attempts to go down the steps of a train in motion, to look to see whether it is safe for him to do it, and it may be that it is an imprudent thing to do it at all, and it may be that it is a prudent thing to do, to go down the steps. It is for you to say, considering all the circumstances, the speed, and what the railroad officials say to him, if they said anything, whether it was a prudent thing for a man of ordinary caution to do to go down the steps to be ready to get off the train when it came to a stop or as it slowed up,—to get in position to alight. For a man to ride on the bottom step of a steam passenger train or of a steam car may be a particularly dangerous thing to do, but there may be circumstances that would relieve that from elements of danger and carelessness, to prevent him from being guilty of contributory negligence, and it is for you to say that in this particular case. [I want to qualify that by saying if you believe that step was not there at all; that there was no third step; that this was a car running with two steps, where there ought to have been three; that the third step was gone, and if this man had looked would have seen it was gone; and that if he stepped down without looking to see,—he cannot recover, because he is guilty of contributory negligence. A man cannot shut his eyes, and walk downstairs, and if he falls say, 'I thought there was a step there, and there was not;' but, as the place he walks in becomes more dangerous, he must become more careful, and look out for the safety of himself and other people.] So, if you believe it was a car that did not have a third step on it, did he make the observation that a prudent and careful man should make before he went down? In other words, do you think he acted as a prudent, careful man ought to have acted as he descended these steps? If he did not, he is guilty of contributory negligence, and cannot recover. If you believe he did look, and that there was a step there, and that step broke under his weight, then you are to say, was the speed of that train so diminished that it was a prudent thing for a man to go down on the step and be ready to alight, because, if it was, he is not guilty of contributory negligence. If it was not a prudent thing for a man to do, in other words, if you think no man should have done that, good step or bad step, that no prudent man would have gone down on the step at that time,—and that was the cause of the injury, he is guilty of contributory negligence and cannot recover. Whether there was a step or whether there was not a step there, or whether it was a step that broke from under him, are questions that you will have to settle."

"Was this man justified in going down—I mean, in your opinion, justified, as a prudent man, in going down—the steps

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of that car, and was the third step there, and was he justified in believing it was safe, and did the step give way because it was a worn-out, weak, or broken step, and thus precipitate him to the ground? If you believe that, your verdict should be in his favor, and for such a sum as will come up to the measure of damages I gave you in the opening of my charge. If you believe he stepped off through space, and there was no step there, and he fell because he did not look, or that it was an imprudent thing to go down that step; that a prudent, careful man should not have gone down the steps, considering the motion and speed of the car; or if you believe he attempted to jump off the car in motion; that there was no weakness or fault in the step in any way to cause the accident,—then the verdict should be for the defendant."

Additional instruction: "Judge Bregy: Gentlemen, I understand that you desire additional instruction. Let the foreman state upon what point or points you desire instruction, and I will give it to you. The Foreman: The jury would like to know whether there was any person stationed on the train when the train comes in, at the entrance where the passengers get off. Judge Bregy: Whether anybody was stationed there or ought to be? The Foreman: Whether anybody ought to be. Judge Bregy: The law does not require anybody to be stationed there. The Foreman: On the negligence of both parties, how can the verdict be given? Judge Bregy: If the negligence is in both parties, the verdict must be for the defendant. An accident like this can happen only in three ways: First. By both parties being at fault, in which case the verdict must be for the defendant; because the law in this state does not allow a jury or anybody to say that one was more at fault than the other, or fix degrees of negligence, but says, if they were both at fault at all to any degree that caused the accident, the verdict must be for the defendant. That is one way an accident can happen. Another way is where it is the fault of the plaintiff alone. In that case, of course, the verdict must be for the defendant. The other way is where it is the fault of the defendant alone, the plaintiff being at no fault. In that case the verdict should be in favor of the plaintiff. [I may add, there is another way an accident could happen, where nobody is at fault. In that case, the verdict should be for the defendant. Therefore, out of the many ways an accident can happen there is only one that justifies a verdict in favor of the plaintiff. That is where you are satisfied from the evidence that the accident was caused by the negligence of the defendant alone; that there was no negligence on the part of the plaintiff that caused the injury.] If you are satisfied there was negligence on both sides, there cannot be a recovery, according to the law of Pennsylvania."

The specifications of error: "(1) Because the learned trial judge refused to affirm plaintiff's first point for charge, which was as follows: 'That the action of the plaintiff in coming

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down the steps of the car with his hand on one or both of the side rails thereof, and while the car itself was slowing up, and in the very act of stopping, was not such contributory negligence on his part as would preclude a recovery.' Answer: 'The plaintiff's first point is declined.' (2) Because the learned trial judge refused to affirm plaintiff's sixth point for charge, which was as follows: 'It is negligence in law to stand on the steps holding the rail.' Answer: 'The sixth and seventh points I decline.' (3) Because the learned trial judge refused to affirm plaintiff's seventh point for charge, which was as follows: 'The mere fact of injury to a passenger raises the presumption of want of care on the part of the carrier.' Answer: 'The sixth and seventh point I decline.'"

Henry C. Terry, for appellant.

Edwin Jaquett Sellers and David W. Sellers, for appellee.

Per Curiam. This case was submitted to the jury in an adequate and impartial charge. It was a charge which presented to the consideration of the jury every possible phase of the case, and which assisted them in the ascertainment of the facts disclosed by the testimony. It was a case in which they undoubtedly sympathized with the plaintiff, but in which they were constrained by the evidence to render a verdict against him. As nothing appears in the evidence which would justify a reversal of the verdict, it remains to be seen whether the court erred in any material respect in its instructions in the general charge, or in its answers to the plaintiff's first, sixth, and seventh points. We find nothing in either of the matters referred to which requires or calls for a new trial. All the specifications of error are accordingly dismissed. Judgment affirmed.

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St. Louis S. W. Ry. Co.

v.

## SHIFLET.

(*Supreme Court of Texas, Nov. 5, 1900.*)

[58 S. W. 945.]

**Accident on Track—Boy's Capacity for Contributory Negligence—Question for Jury.\***—Whether deceased, a boy of 12 years, who was run over by a railway train, was of sufficient intelligence to be guilty of contributory negligence, was a question for the jury, if there was any evidence on the subject.

**Same—Boy's Realization of Danger—Sufficiency of Evidence.**—Where deceased, a boy of 12 years, had walked about 20 miles on defendant's

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\*See generally, *notes*, 19 Am. & Eng. R. Cas., N. S., 355 *et seq.*

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track, and was run over at 11 p. m. by one of defendant's trains, and it was claimed that he had fallen asleep on the track, and the only evidence tending to show that he was not of sufficient discretion to realize the danger of his position was the testimony of two witnesses that he was not of sufficient intelligence to understand that he was liable to fall asleep if he sat down to rest on the track, it was error to submit the question of his capacity to realize the danger to the jury, since the negligence consisted in the position he occupied, and not in the liability to go to sleep.

**Same—Same—Evidence.**—Evidence that deceased, injured on a track, was not of sufficient intelligence to go alone to a distant town, was inadmissible to establish his incapacity to appreciate the danger of his position on the track.

Error to court of civil appeals of Fifth supreme judicial district.

Action by F. A. Shiflet against the St. Louis Southwestern Railway Company. From a judgment for plaintiff, affirmed by the court of civil appeals, defendant brings error. Reversed.

Frost, Neblett & Blanding and S. H. West, for plaintiff in error.

Richardson, Watkins & Miller, for defendant in error.

Brown, J. The defendant in error instituted this suit to recover damages for the death of his son, Thomas Shiflet, who, he alleged, was killed on the track of the railway company through the negligence of its employees. The

**Case Stated.**

evidence tends to show that the accident occurred in the nighttime, in Henderson county, about two miles and a half from a little village known as Brownsboro, and upon the track of the railway company, at a point where it was not fenced. It is charged that the servants of the railway company negligently failed to keep a proper lookout, and thereby failed to discover the deceased, who was upon its track, and, running over him, negligently caused his death. The village of Brownsboro consists of two stores and a drug store, and one or two other houses. Between the village and the place of the accident, and for some distance beyond that, there are a number of houses near to the railroad track, where the farming people of that county reside. Between the rails of the railroad, dirt was thrown in, until it was filled above the ties; the dirt being of a light color. Along the center, and between the rails, this dirt was packed down, as if it had been traveled over by persons on foot, making a path over the dirt. It was proved by those who lived near by in the neighborhood that for a great many years it had been the habit of the people who lived near to the railroad, when they went to the village on foot, to walk to and from it along the railroad track, and that persons were seen almost every day traveling upon the rail-

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road in this way. It was not shown that any objection had ever been made by the railroad company or any of its employees. No person had been seen to walk upon the track in the nighttime. From the place where the accident occurred, westward, the track was straight for 150 or 250 yards, and the grade rose to the east; that is, towards the place of the accident. It was testified to that an engineer with a headlight burning could have seen a boy lying upon the track at the distance of 150 to 200 feet. The engineer and fireman testified that they did not see the boys, and did not know that any one was hurt until they arrived at Tyler, and found upon the pilot blood, pieces of clothing, and human flesh. At the point indicated upon the defendant's track, and between the rails, was found a pool of blood, where there had been such a quantity of it that it ran down the embankment for several feet; and a short distance from it another pool of blood, of considerable quantity. The blood was spattered on the west side of the ties, and the fragments of clothing, bones, and flesh were found at a distance of 20 or 25 feet from where the pool of blood was; but the remains were so mangled as to be not recognized, except from the clothing. The train upon which the blood was discovered passed that point about 11 o'clock at night. Defendant in error, F. A. Shiflet, lived about two miles and a half north from Brownsboro, and about the same distance from the railroad track. On Sunday morning of the same day that the boy was killed at night, Thomas Shiflet, without permission of his father, left home to go down near to the railroad track, to the house of a neighbor. He went to that house, and there he was joined by two other boys; and the three, at about 11 o'clock in the day, started to go back to Mr. Shiflet's. The next time they were seen was at a point about 10 miles west of Brownsboro, on the railroad, at which point the three boys were together, walking along the railroad track, and going west, about 3 o'clock in the afternoon. At the same point, late in the afternoon, just before night, the same boys returned, going eastward, walking along the defendant's track. They were never seen again, living. Their remains were found the next morning, as above stated. Upon the intelligence of the boy Thomas Shiflet, the following testimony was given. The defendant in error testified, in substance, that the boy was just a common country boy, of average intelligence, and it looked like he ought to have intelligence enough to know that, if a railroad train passed over him, it would kill him. He was large enough to work around the place some, and had just commenced to do his first plowing. Had been to school some. Could read a little, but could not write. The boy had been to Brownsboro a few times, sometimes with the father, and a time or two he went alone, to sell eggs and butter for his mother; but he had never been on a train, or close to one. Witness did not believe that the boy had discretion to appreciate the danger that he might

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go to sleep. Did not have discretion enough to go alone to Kaufman or Greenville. W. P. Hollman testified that he knew the boy Thomas Shiflet. Did not think that he had sufficient intelligence to appreciate the fact that, if he sat down on the railroad, he was liable to drop asleep and get run over. Did not think he had sufficient intelligence to stop and think over the fact, and reason to himself that it would be dangerous for him to sit down, for fear he might go to sleep. Witness had six boys of his own, and he could hardly keep them awake long enough to get them to bed. He based his opinion on his knowledge of boys generally, and said that, when a boy is tired and lies down, he does not believe he will go to sleep, but he will. J. S. Hollman had known the deceased since he was six months old. He had seen him in Brownsboro, and the boy had seen a train. The witness had heard the boy talk about the train. He was a boy of average intelligence, was not weak minded, and was able to work intelligently. The petition presented the case upon the ground that the deceased was upon the defendant's railroad track at a point where the public had used the railroad as a footway for a long time, and to such an extent as to notify the railroad company of the fact, and to impose upon it the duty of exercising the care which would be required at a place where people might be expected to be upon the track. It is alleged that the servants operating the train by which the boy was killed were guilty of negligence in failing to keep a proper lookout, and in failing to discover him upon the track of the railroad, and also that the deceased was of such immature age and so wanting in discretion as not to be responsible for the negligence, if any, of being upon the defendant's railroad. The defendant pleaded the contributory negligence of the deceased. The trial court did not submit to the jury whether the deceased was rightfully upon the track, but, in the charge given, assumed that being upon the track of the defendant's railroad at the time and place when and where he was killed was an act of negligence on his part, and must defeat the right of recovery, unless the deceased was of such tender age and want of discretion that he did not know and appreciate the danger of his position. Two theories of the manner in which the accident occurred are presented: (1) That the three boys were walking along the railroad track in the nighttime, and were overtaken and run down by the train without any warning; the operatives upon the train failing to keep a proper lookout and failing to discover them. (2) That Thomas Shiflet and his companions, having walked upon the defendant's track for some distance, being weary, sat down to rest, fell asleep upon the track, and were run over by the defendant's train; the employees of the defendant being negligent in failing to discover the parties upon the track, and failing to give any warning or use proper diligence to prevent the accident. The plaintiff below presented and



## St. Louis S. W. Ry. Co. v. Shiflet

insisted upon the evidence that raises the issue that the deceased was asleep upon the track at the time he was killed, which evidence was admitted over the objections of the defendant. The court seems to have adopted this view of the accident, and to have cast the case upon that line.

We must treat the case as if the fact that the deceased was guilty of negligence in being upon the defendant's track had been found by the jury. In determining the question of the

**Accident on  
Track—Boy's  
Capacity for Con-  
tributory Negli-  
gence—Question  
for Jury.**

responsibility of deceased, we can consider only the testimony which supports the action of the court, and we must give to that evidence full weight, indulging every inference that a jury might properly draw from it; and if a jury could have properly concluded that Thomas Shiflet was of such immature age and so wanting in discretion and intelligence that he did not understand and appreciate the danger of being upon the track of the defendant's railroad at the time and place of the accident, the judgment must be affirmed, otherwise it must be reversed. The evidence showed that Thomas Shiflet was between 11 and 12 years old,—most probably, within 2 months of the latter age. This does not bring him within the age at which courts have held a child to be exempt, as a matter of law, from the charge of contributory negligence; neither does it place him at such age as the court will, as a matter of law, hold that he was responsible for his acts. It was question of fact for the jury, to be determined upon the evidence adduced before them. If there was no evidence upon the subject, the issue should not have been submitted, or, having been submitted, the jury ought to have found for the defendant, because it devolved upon the plaintiff to show that, for want of discretion, the negligent act of the deceased was not imputable to him. *Railway Co. v. Hoffman*, 82 Ill. App. 464; *Railway Co. v. Eininger*, 114 Ill. 82, 29 N. E. 196. Considering the deceased as responsible for his facts, he was upon the railroad track, whether walking or sitting upon it, in a state of negligence; and the question is, was

**Same—Boy's Real-  
ization of Danger  
—Sufficiency of  
Evidence.**

he so wanting in knowledge of the danger of his position, and so incapable of appreciating that danger, as to excuse him for being in the position of danger? There is no evidence which tends to prove that Thomas Shiflet did not know the danger of being upon the railroad track, or that, knowing the danger, there was any reason why he should not have appreciated it as fully as any other person. He had frequently been to the little town of Brownsboro, seen the railroad trains, and had more than once been intrusted by his mother to go to the village alone on business. He had on this occasion, according to the evidence, walked upon the track for a distance of perhaps 20 miles or more. That he must have known the danger of being upon the track is evident from the plain fact that standing upon a railroad track where trains pass necessarily involves danger.

## St. Louis S. W. Ry. Co. v. Shiftet

To say that one knows the danger of being run over by a railroad train, if upon the track, and yet does not appreciate the danger of being and remaining upon the track, is contradictory, not only in its terms, but in the very substance of the proposition. The knowledge of such a danger necessarily involves an appreciation of it. Two of the witnesses swore that they did not believe that Thomas Shiftet was possessed of sufficient intelligence to understand that, if he sat down upon the railroad track, he might fall asleep. Giving full force to this evidence and every inference to be drawn from it, can it be said that the boy's failure to realize that he might fall asleep had any thing to do with his going into danger or remaining there? We cannot understand how a jury could infer from the fact that he did not appreciate the danger of going to sleep that therefore he did not appreciate the danger of his position, and it seems to us that the consciousness of danger in the place he occupied constitutes the negligence, and establishes the responsibility for remaining in that position. If he had remained awake, either sitting or standing upon the track, and the accident had occurred to him, he could not have been excused, because he was negligent, and was responsible, under the facts, for his acts. Being negligent and responsible while awake, his falling asleep did not palliate or lessen the degree of his negligence. *Ecliff v. Railway Co.*, 64 Mich. 203, 31 N. W. 180. In the case cited a boy 12 years old was riding upon the front of a locomotive, and the court said, "The fact that a boy of that age is more reckless and not as cautious as a man in the face of such danger is not, of itself, enough to excuse him." The liability to go asleep cannot excuse the negligence of being in a place of danger. This is not like the case of *Railroad Co. v. Simpkins*, 54 Tex. 615, where a man, in attempting to cross a railroad track, fell down in a fit and was run over. In that case the man was not conscious of the danger of his position, and could not have prevented the accident. He was overtaken by the fit unexpectedly, and, so far as the evidence showed, while he was in the act of passing over the track. The case is not analogous to the turntable cases, in which it has been held that a turntable offered to boyish inclination for sport an invitation to ride upon it, and was the means of exciting his childish curiosity, and of leading him into danger. Admitting that all boys are liable to fall asleep when they lie down, this does not excuse a boy who is conscious of his danger for lying down or sitting down in a place of danger, and thereby, through his own act, subjecting himself to that infirmity. The natural inclination to sleep did not induce him to go upon the track, but it enhanced the danger to himself.

It is claimed by the defendant in error that the evidence shows that the railroad track had been used at the point of the accident so constantly and for such a length of time as would excuse the deceased for being upon it at that time and place,

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and that the jury might have found that he was rightfully upon the track. Conceding, for the sake of argument, that the evidence was sufficient for the court to have submitted that issue to the jury, it was not so conclusive as to authorize this court to assume that the jury could not properly have found to the contrary. If this court were to affirm the judgment upon that ground, it would be acting upon an issue not submitted to the jury, and upon which they could not have passed, under the charge, and the judgment would be without support in the verdict. *Williams v. Conger*, 49 Tex. 602.

We are of opinion that the court improperly admitted the evidence that Thomas Shiflet was not of sufficient intelligence and discretion to go alone to other counties and to distant towns, because the evidence tended in no respect to establish his incapacity to understand and appreciate the danger of his position. There being no evidence to sustain the finding that Thomas Shiflet was without sufficient discretion and judgment to understand and appreciate the danger of his position, the district court erred in submitting that issue to the jury, for which error the judgments of the district court and court of civil appeals are reversed, and this cause is remanded.

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LOUISVILLE & N. R. Co.

v.

KICE.

*(Court of Appeals of Kentucky, Feb. 13, 1901.)*

[60 S. W. 705.]

**Killing Horse on Track—Joinder of Actions—Election.**—Under Ky. St. § 809, providing that "if, by the locomotive or cars of any company, cattle shall be killed or injured on the track of said road adjoining the lands belonging to or in the occupation of the owner of such cattle, who has not received compensation for fencing said land along said road, the loss shall be divided between the railroad company and the owner of such cattle; but in every case where the cattle are killed or injured by negligence or carelessness of the agents or servants of the company, it shall pay full damages for such killing or injury,"—where plaintiff sought by his original petition to recover the full value of a horse alleged to have been negligently killed by one of defendant's trains, an amended petition alleging that plaintiff had not received compensation for fencing his land along the railroad, and asking that, if he could not be allowed the full value of the horse, he have judgment for one-half of that amount, did not state a separate cause of action; therefore the court properly refused to require plaintiff to elect.

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**Same—Constitutionality of Statute Creating Liability, Regardless of Negligence.\***—The fact that the statute makes railroad companies liable in certain cases, regardless of negligence, does not render it unconstitutional.

**Evidence of Pedigree of Horse.**—Evidence as to the pedigree of a horse, as shown by the American stud books, is admissible on the question of value.

**Animals on Track—Duty of Trainmen—Lookouts.†**—It is the duty of the servants in charge of a train to keep a lookout for animals upon the track, and, after they are discovered, to use all reasonable precautions, consistent with the safety of the train, to avoid injuring them.

Appeal from circuit court, Jefferson county, common pleas division.

“To be officially reported.”

Action by M. S. Kice against the Louisville & Nashville Railroad Company to recover the value of a horse alleged to have been killed by one of defendant's trains. Judgment for plaintiff, and defendant appeals. Affirmed.

Lyttleton Cooke, for appellant.

Gardner & Moxley, for appellee.

Burnam, J. The appellee instituted this action against appellant to recover the value of a thoroughbred race horse alleged to have been negligently killed by one of appellant's trains. The suit was instituted under section 809 of the Kentucky Statutes, which reads as follows: “If, by the locomotive or cars of any company, cattle shall be killed or injured on the track of said road adjoining the lands belonging to or in the occupation of the owner of such cattle, who has not received compensation for fencing said land along said road, the loss shall be divided between the railroad company and the owner of such cattle; but in every case where the cattle are killed or injured by negligence or carelessness of the agents or servants of the company, it shall pay full damages for such killing or injury.” Appellant in its answer admitted the killing of the horse by its train, but denied that it was guilty of any negligence, and alleged that the killing of appellant's horse was unavoidable so far as it was concerned. Several months after the institution of this suit appellee filed an amended petition, in which he alleges that the place where the horse was killed was on the track of the defendant's

\*As to constitutionality of statutes creating liability on the part of railroads in the absence of negligence, see *Chicago, etc., Ry. Co. v. Zerneck* (Neb.), 17 Am. & Eng. R. Cas., N. S., 76, and *foot-note*, 77; *St. Louis & S. F. R. Co. v. Mathews* (U. S.), 6 Am. & Eng. R. Cas., N. S., 361, and *notes*, 387 *et seq.*

†See *Keilbach v. Chicago, etc., Ry. Co.* (N. Dak.), 14 Am. & Eng. R. Cas., N. S., 28, and *note*, 30.

## Louisville &amp; N. R. Co. v. Kice

road adjoining lands belonging to, and occupied by, plaintiff; that he had not received compensation for fencing his land along the road at that point; and asked that, if he was not allowed the full value of the horse, he have judgment for one-half of such amount. To the filing of this amended petition appellant objected on the ground that a distinct and separate cause of action was set up. Appellant's objections were overruled, and the amended petition permitted to be filed. Thereupon appellant moved the court to require appellee to elect which of his alleged causes of action he would prosecute, which the court declined to do, and this refusal is the first alleged error relied on for reversal. The amended petition did not set up a separate or distinct cause of action. The gist of appellee's action was to recover for the killing of his horse. Under the provisions of section 809 of the Kentucky Statutes, he was entitled to recover his full value if his killing by defendant's agents was the result of negligence on their part, and half of his value if the killing occurred on the track of appellant's road adjoining lands belonging to, or in the occupation of, the owner, who had not received compensation for fencing his land along said road. Both remedies are provided by the same section of the statute, and are not inconsistent or incompatible with each other, and the court properly overruled the motion to require appellee to elect.

It is also contended by appellant that so much of section 809 of the Kentucky Statutes as declares railroad companies liable regardless of the question of negligence is unconstitutional, and in support of this contention refers us to the case of *Railway Co. v. Autaolt* (Colo. App.) 31 Pac. 177. The constitutionality of this statute was considered by the court in the case of *Railroad Co. v. Belcher*, 89 Ky. 198, 12 S. W. 195, and it was held that such legislation was not prohibited by any provision of the constitution, and that there was no room to question the constitutionality of the act, referring to the case of *Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463, in which an opinion of the supreme court of Missouri upholding the constitutionality of a similar act in that state was affirmed. The question is therefore not an open one in this state.

Another ground of complaint is that the trial court permitted witnesses for appellee to testify as to the pedigree of the horse killed, as shown by the American stud books. Undoubtedly the pedigree of a race horse constitutes an important element in determining its value, as it is a matter of common knowledge that a much larger proportion of thoroughbred horses are successful racers than horses not so bred. It appears from the testimony that the stud books in question are records carefully compiled by experts under the supervision of the breeders of this class of horses, and that they have been so kept for many years, and are universally accepted as conclusive evidence upon this point by persons dealing in such animals.

Section 1325 of the Kentucky Statutes provides severe penalties for furnishing false pedigrees of stock, and we are of the opinion that the court did not err in permitting the witnesses to testify as to the pedigree of the animal killed as shown by these records.

It is also contended that under the testimony appellant was entitled to have had a peremptory instruction given to the jury to find for them, in so far as appellee sought recovery on the ground of negligence, as it is contended that the uncontradicted testimony of appellant's employees in charge of the train which killed the horse shows that there was no negligence on their part, and that every precaution was taken by them after the discovery of the horse to prevent injury. The testimony on this point is not of that clear and conclusive character in which this rule is applied. The engineer of the train, who is the chief witness on this point for appellant, testifies that his train was running about 25 miles an hour when he discovered this horse, in company with three others, running on the side of the track about 100 feet ahead of the engine; that the engine at this time was about 700 feet from the mouth of the cut in which the horse was killed; that the cut was between 350 and 400 feet in length; that the horses had to run between 400 and 500 feet before they got to the mouth of the cut; that he thought they did not enter the cut at all, but passed over the hill; that the horse that was killed suddenly turned back, and attempted to cross the track immediately in front of the engine; that he applied his air brake as soon as he discovered the horse, and actually stopped his train within 500 feet from where he first saw the horses. Witnesses for appellee contradict the statement of the engineer in several important particulars. They testify that the distance between the point where the engineer locates his train at the time he first discovered the horses and the point where the horse was struck in the cut was between 600 and 700 feet; that the horse did not go over the hill at all, but entered the cut, and ran directly in front of the engine for something like 300 feet before he was struck. It was the duty of appellant's agents to have kept a lookout for stock upon its track, and after their discovery to have used all reasonable precautions, consistent with the safety of the train, to avoid injuring them. Under the evidence, the case was properly submitted to the jury, and we cannot say that the jury was not warranted in concluding that appellant's servants in charge of the train might not, by proper diligence, have avoided killing the horse. The testimony as to the value of the horse was very conflicting, and this question was properly submitted to the jury. The instructions complained of we think fairly give to the jury the law applicable to the case. For reasons indicated, the judgment is affirmed.

E. M. PATTON, Plff. in Err.,

v.

TEXAS &amp; PACIFIC RAILWAY COMPANY.

*(Argued December 6, 7, 1900. Decided January 7, 1901.)*

[21 Sup. Ct. Rep. 275.]

**Injury to Employee—Contributory Negligence.**—A locomotive fireman who, for his own convenience, attempts to discharge his duties of cleaning the engine at the end of his trip without waiting for it to be inspected and repaired, though knowing that he will have plenty of time to do his work after such inspection, cannot hold the company responsible for a defect on account of which he is injured, which would undoubtedly be disclosed by the inspection and then repaired.

**Same—Presumption of Negligence.\***—The fact of an accident to an employee raises no presumption of negligence on the part of the employer.

**Same—Contributory Negligence—Direction of Verdict.**—The court properly directs a verdict for defendant, and refuses to leave the question of negligence to the jury, in an action by a locomotive fireman for injuries sustained by the turning of a loose step on a locomotive while he was cleaning it at the end of his trip, where it is admitted that the step, the rod, and the nut were suitable and in good condition, that the inspectors at both ends of the trip were competent, and that the step was securely fastened at the beginning of the trip, while the fireman undertook to clean the engine without waiting for the regular inspection, which would undoubtedly have led to the discovery and repair of the defect.

In error to the United States Circuit Court of Appeals for the Fifth Circuit to review a decision affirming a judgment on a verdict directed by the judge in an action against a railroad company for personal injuries. Affirmed.

See same case below, 37 C. C. A. 56, 95 Fed. Rep. 244.

Statement by Mr. Justice Brewer:

Plaintiff in error, plaintiff below, brought his action against the defendant to recover for injuries sustained while in its employ as fireman. A judgment in his favor was reversed on April 10, 1894, by the circuit court of appeals. 9 C. C. A. 487, 23 U. S. App. 319, 61 Fed. Rep. 259. On a second trial in the circuit court the judge directed a verdict for the defendant, upon which judgment was rendered. This judgment was affirmed by the circuit court of appeals (37 C. C. A. 56, 95 Fed. Rep. 244), and thereupon the case was brought here on error.

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\*See *Hodges v. Kimball* (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 755, and *foot-note*.

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The facts were that plaintiff was a fireman on a passenger train of the defendant, running from El Paso to Toyah and return. Some three or four hours after one of those trips had been made, and while the engine of which he was fireman was being moved in the railroad yards at El Paso, plaintiff attempted to step off the engine, and in doing so the step turned, and he fell so far under the engine that the wheels passed over his right foot, crushing it so that amputation became necessary. Plaintiff alleged that the step turned because the nut which held it was not securely fastened; that the omission to have it so fastened was negligence on the part of the company, for which it was liable.

Messrs. Frank W. Hackett and Millard Patterson for plaintiff in error.

Messrs. John F. Dillon, Winslow S. Pierce, and David D. Duncan for defendant in error.

Mr. Justice Brewer delivered the opinion of the court:

The plaintiff's contention is that the trial court erred in directing a verdict for the defendant, and in failing to leave the question of negligence to the jury.

That there are times when it is proper for a court to direct a verdict is clear. "It is well settled that the court may withdraw a case from them altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Phoenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30, 32, 27 L. Ed. 66, 1 Sup. Ct. Rep. 18; *Griggs v. Houston*, 104 U. S. 553, 26 L. Ed. 840; *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 482, 27 L. Ed. 1003, 1005, 3 Sup. Ct. 322; *Anderson County Comrs. v. Beal*, 113 U. S. 227, 241, 28 L. Ed. 966, 971, 5 Sup. Ct. Rep. 433; *Schofield v. Chicago, M. & St. P. R. Co.*, 114 U. S. 615, 618, 29 L. Ed. 224, 225, 5 Sup. Ct. Rep. 1125; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 472, 35 L. Ed. 213, 215, 11 Sup. Ct. Rep. 569." See also *Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. Ed. 758, 12 Sup. Ct. Rep. 835; *Elliott v. Chicago, M. & St. P. R. Co.* 150 U. S. 245, 37 L. Ed. 1068, 14 Sup. Ct. Rep. 85.

It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact; and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. *Richmond & D. R. Co. v. Powers*, 149 U. S. 43, 37 L. Ed. 642, 13 Sup. Ct. Rep. 748.

Hence it is that seldom an appellate court reverses the



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action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions.

While it would needlessly prolong this opinion to quote all the testimony, it is proper that its salient features should be noticed. The single negligence charged is in the failure to have the engine step securely fastened. That step, a shovel-shaped piece of iron, is firmly fixed to a rod of iron about 1 inch in diameter and 18 inches in length, which passes up through the iron casting at the rear of the engine, about 6 or 8 inches thick. A shoulder to this rod fits underneath the casting, and the part passing through above has threads on the upper end upon which a nut is screwed firmly down on the casting, fastening the rod so that it will not move. That the step, rod, and nut were in themselves all that could be required is not disputed. That the nut was properly screwed on at El Paso, before the engine started on its trip, is shown; the plaintiff, who assisted there, testifying to the fact. The engineer testified that he used the step both on the trip to Toyah and the return trip to El Paso, and found it secure; and there is nothing to contradict this evidence. The engineer in his report of needed work both at Toyah and on his return at El Paso did not mention the step. He certainly supposed it secure. Competent inspectors were provided by the company both at El Paso and Toyah, and neither of them detected any failure in the secure fastening of the step by the nut. All of the witnesses, except the superintendent and foreman of defendant, testified that if the nut had been securely fastened at El Paso it would not have worked loose in making the trip from El Paso to Toyah and return by the ordinary jar and running of the engine; that it might be loosened by the step striking something. The superintendent and foreman testified from an experience of twenty years with engines that it might work loose on such trip, but that it was impossible to tell whether it would or not.

It was the duty of the fireman to clean the cab and all that portion of the engine above the running board, and to keep

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the oil cans and lubricators filled with oil. It was not necessary for him to attend to this work until eight hours after the engine arrived at El Paso, though it was more convenient to do so while the engine was hot and the oil warm, as it would take less time than when the engine was cooled off. After the engine reached El Paso the fireman and the engineer would get off, and it would be taken charge of by the yard men, who would detach it from the train, take it to the yard, coal and sand it, and do all things necessary except the matter of repair, then place it in the round house, where it would be cleaned by employees other than the fireman, in all its parts beneath the running board, and inspected by the machinist, and repaired; and after that, the fireman would have ample time for all the duties imposed upon him before the engine started on another trip. All this the plaintiff knew, and simply took the time he did for his work for his own convenience. On this particular day he did not commence work until three or four hours after the arrival of the train at El Paso. Prior to that time the engine had been coaled up, the coal being placed in the tender back of the engine. Some of the pieces of coal were from 1 foot to 18 inches in length and from 6 to 8 inches in width, and very heavy, and one of them falling off might strike the step. The engine had not at the time of the accident reached the round house for inspection and repair, and this the plaintiff knew.

From this outline it appears that the master provided perfectly suitable appliances, and appliances in good condition; that they were properly secured when the engine started on its trip; and that it is impossible to tell from the testimony how the step was loosened. It may have been from the ordinary working of the engine, the possibility of which was testified to by the superintendent, who had had long experience with engines. It may have been because the step struck something on its trip, which striking might produce that result according to the testimony of other experts, who denied that the ordinary working of the engine would loosen it. We say this notwithstanding the testimony of the plaintiff that the step did not hit anything on the trip, for the step was on the right side of the engine, the side occupied by the engineer, and therefore a striking might have occurred without the knowledge of the plaintiff, whose work did not call him to that side of the engine. It may have resulted from the dropping on the step of some of the large lumps of coal which were thrown into the tender after reaching El Paso. We are not insensible of the matter to which the plaintiff calls especial attention, to wit, a conflict between the testimony given by Alexander Mitchell, the round-house foreman at Toyah, at the first trial, and that given by him at the last. At the first trial he testified that the step was not taken off at Toyah. In the last that it was. He also testified that, though taken off, it was securely

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fastened before the train left. The inference, of course, sought to be drawn is that the testimony of this witness is unreliable; that it is to be believed that he unscrewed the nut, but not to be believed that he screwed it up tightly; and therefore another possibility of the cause of the loosening of the step is introduced into this case. But giving full weight to this suggestion, it still appears that it is a mere matter of conjecture as to how the step became loose.

On the other hand, it must be remembered that the plaintiff, who knew that the engine was to be taken to the round house at El Paso, and inspected and repaired before he was

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ployee—Contrib-  
utory Negligence.**

called upon to perform any duties upon it, for his own convenience, before such inspection and repair, went on the engine and attempted to discharge his duties of cleaning, etc. If he, knowing that there was to be an inspection and repair, and that he had ample time thereafter to do his work, preferred not to wait for such inspection and repair, but to take the chances as to the condition of the engine, he ought not to hold the company responsible for a defect which would undoubtedly have been disclosed by the inspection, and then repaired.

Upon these facts we make these observations: First. That while, in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier,

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tion of Negli-  
gence.**

a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely (*Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115; *New Jersey R. & Transp. Co. v. Pollard*, 22 Wall. 341, 22 L. Ed. 877; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 443, 35 L. Ed. 458, 463, 11 Sup. Ct. Rep. 859) a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707. Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an acci-

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dent justifies any departure from settled rules of proof resting upon all plaintiffs. Third. That while the employer is bound to provide a safe place and safe machinery in which and with which the employee is to work, and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employee, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe. *Hough v. Texas & P. R. Co.*, 100 U. S. 213, 218, 25 L. Ed. 612, 615; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 386, 37 L. Ed. 772, 780, 13 Sup. Ct. Rep. 914; *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 87, 39 L. Ed. 624, 630, 15 Sup. Ct. Rep. 491; *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 669, 42 L. Ed. 1188, 1190, 18 Sup. Ct. Rep. 777. He is bound to take reasonable care and make reasonable effort; and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes, then, a demand of higher supremacy; and yet, in all cases it is a question of the reasonableness of the care; reasonableness depending upon the danger attending the place or the machinery.

The rule in respect to machinery, which is the same as that in respect to place, was thus accurately stated by Mr. Justice Lamar, for this court, in *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 570, 34 L. Ed. 235, 241, 10 Sup. Ct. Rep. 1044:

"Neither individuals nor corporations are bound, as employers, to insure the absolute safety of machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employee or servant."

Tested by these rules we do not feel justified in disturbing the judgment, approved as it was by the trial judge and the several judges of the circuit court of appeals. Admittedly, the step, the rod, the nut, were suitable and in good condition. Admittedly, the inspectors at El Paso and Toyah were competent. Admittedly, when the engine started on its trip from El Paso the step was securely fastened, the plaintiff himself being a witness thereto. The engineer used it in safety up to the time of the engine's return to El Paso. The plaintiff was not there called upon to have anything to do with the engine until after it had been inspected and repaired. He chose, for

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his own convenience, to go upon the engine and do his work prior to such inspection. No one can say from the testimony how it happened that the step became loose. Under those circumstances it would be trifling with the rights of parties for a jury to find that the plaintiff had proved that the injury was caused by the negligence of the employer.

The judgment is affirmed.

## CLEVELAND T. &amp; V. R. Co.

v.

MARSH.

(*Supreme Court of Ohio, Oct. 16, 1900.*)

[58 N. E. 821.]

**Testimony.**—It is error to allow a witness to testify, over the objection of the other side, as to the identity of a person, without first qualifying himself by showing that he has some knowledge on the subject.

**Same.**—A witness should testify in accordance with the knowledge he has at the time of testifying, and is not confined to the knowledge he may have had at a previous time.

**Employees—Care Due to Person Invited by Servant to Assist.\***—One who is invited by a servant of a corporation in charge of its work or service to assist him therein, and does so with some purpose or benefit to be subserved in his own behalf in addition to the purpose of so assisting, is not a volunteer, and is entitled, while so assisting, to be protected against the negligence of the servants of the company.

**Tracks—Right to Complain of Defect.**—While a railroad company owes a duty to the public to keep its tracks free from unnecessary danger along where the public are allowed to use such tracks as a way for travel, one who is not using such tracks as such way cannot be heard to complain of the breach of such duty, and, in case of injury to him, cannot bring the breach of such duty to his aid in attempting to recover for an injury caused by reason of some other alleged negligence of the company.

**Negligence—Sufficiency of Evidence.**—To establish negligence, there should be either direct proof of the facts constituting such negligence, or proof of facts from which negligence may be reasonably presumed. There should be no guessing by either court or jury.

WILLIAMS and MINSHALL, JJ., dissenting.

(Syllabus by the Court.)

Error to Summit county circuit court.

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\*See extensive note, 17 Am. & Eng. R. Cas., N. S., 442 *et seq.*

Cleveland T. & V. R. Co. v. Marsh

Action by Raymond G. Marsh against the Cleveland Terminal & Valley Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

The action in the court of common pleas was for the recovery of damages for a personal injury suffered by Raymond G. Marsh, then of the age of 10 years, by reason of the explosion of a signal torpedo on the track of the railroad of the plaintiff in error. The injury occurred at the village of Myersville, and at that place the railroad runs north and south, and the main street of the village, running east and west, crosses the railroad; the station and water tank being on the south side of the street, and a switch stand about 40 rods north of the street, and another about a quarter of a mile south of the street. The railroad company had employed Milo Swinehart as station agent, and it was his duty to light and place upon the switch stands each evening certain lights supplied by the company for the purpose, and to bring the lanterns in each morning, and clean and fill them, so as to have them ready for use the next evening. The station agent, without authority, and without the knowledge of the company, employed the Marsh boy to attend to the lamps; and when on his way to the north switch stand with the light on the evening of April 18, 1896, he found a signal torpedo by the side of one of the rails, at a point about 20 rods north of the street, and, not knowing its dangerous character, he put down his lamp, and exploded the torpedo by pounding it with a stone, and the explosion seriously injured him. The petition averred, and the evidence introduced tended to prove, that people, including children, were generally, for years, accustomed to pass along and upon the railroad where the injury occurred, without hindrance, and with the full knowledge of the railroad company. On the day of the accident, at the hour of 12:33 noon, a local freight train arrived at Myersville station from the north, and ran upon the switch north of the public highway, entering the same at the north end, and there remained until a passenger train, also from the north, which arrived at 12:47 p. m., had passed, and a passenger train from the south, which arrived at 1:01 p. m., had also passed. At 1:03 p. m. it pulled out onto the main track from the south end of the switch, which was about one-fourth of a mile south of the highway, and departed south. Upon the trial there was evidence, admitted over the objection of the defendant below, which tended to prove that one of the crew of the freight train obtained a signal torpedo from the station agent while the train was on the side track that day, and then proceeded towards the north end of his train. As to who placed the torpedo upon the railroad track, or how it came to be there, there was no evidence except the above,—as to one of the train crew having that day obtained such torpedo from the station agent. At the close of plaintiff's evidence, counsel for the railroad company moved the court

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to rule out all the evidence relating to the travel of people generally upon and along the railroad track north of the highway, which motion was overruled and exceptions taken. There were also proper exceptions saved to the introduction of certain testimony, and to the refusal of the court to charge as requested, and to the charge as given, which fully appear in the opinion. There were a verdict and a judgment for the plaintiff below, which was affirmed by the circuit court; and now the railroad company comes here, seeking to reverse the judgments of the lower courts.

J. P. Bradbury and Allen & Cobbs, for plaintiff in error, cited the following cases: Wood, Mast. & S. § 455, and notes; Flower v. Railroad Co., 69 Pa. St. 210, 8 Am. Rep. 251; Church v. Railway Co., 50 Minn. 218, 52 N. W. 647, 16 L. R. A. 861; Mayton v. Railroad Co., 63 Tex. 77, 51 Am. Rep. 637.

Tibbals & Franks, for defendants in error, cited the following cases: Railway v. Bolton, 43 Ohio St. 224, 1 N. E. 333; Wischam v. Richards, 136 Pa. St. 109, 20 Atl. 532, 10 L. R. A. 97; Osborne v. Railroad Co., 68 Me. 49, 28 Am. Rep. 16; Barstow v. Railroad Co., 143 Mass. 535, 10 N. E. 255; Eason v. Railway Co., 65 Tex. 577, 57 Am. Rep. 606; Rolling-Mill Co. v. Corrigan, 46 Ohio St. 283, 20 N. E. 466; Johnson v. Water Co., 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243; Rhodes v. Banking Co., 84 Ga. 420, 10 S. E. 922, 20 Am. St. Rep. 362; Evarts v. Railway Co. (Minn.) 57 N. W. 459.

Burket, J. (after stating the facts). The first question arises as to the introduction of part of the evidence by Dr. Bauer. He testified that on the day of the accident he was in the

**Testimony.**

station when the freight train from the north pulled in upon the side track, and that, "While in there, one of the train crew, I took it to be, came in and held a conversation—" Objection being made, counsel for plaintiff said, "Describe this man that came in." Counsel for defendant, still objecting, said, "He may describe the man." The witness answered, "He was a stranger to me, but he was a trainman,—one of the train crew." The court was asked to exclude and rule out this testimony, but refused to do so, to which there was an exception saved. This testimony was not competent. When a party offers evidence, he must first qualify his witness to speak as to the subject matter. Here the witness failed to show that he was qualified to say whether the man was one of the crew or not. And, objection being made by counsel for the defendant, it was incumbent upon the plaintiff to show that the witness had some means of knowledge upon the subject, and was not just merely guessing at it. The same witness also testified that this trainman obtained an object from the station agent, and that the trainman and the station agent had some conversation about it, and the station agent said: "Here is one. I have got one,"—and handed it to the trainman; that the object was a metallic box about 3 inches long, 2½ inches wide, and ¾ of an inch thick,

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with rounded ends; that at the time he did not know what it was, but that he knew at the time of testifying that it was a signal torpedo. To all of this testimony there was objection, and proper exceptions saved. As the witness had not qualified as to whether the man who came into the station was a trainman or not, the evidence as to the conversation was incompetent. If the witness did not know on that day what the object so delivered by the station agent was, but, by knowledge subsequently obtained, knew at the time he testified that it was a signal torpedo, it was competent for him to testify to the fact as he knew it to be at the time of testifying. Runyan v. Price, 15 Ohio St. 1. A witness may see a stranger and not know who he is, but by knowledge subsequently obtained, as by acquaintance and association with him, he may be able years afterwards to testify positively who the stranger was. A witness should testify as his knowledge is at the time of testifying, and not as his ignorance as at a previous time.

Upon the trial, counsel for the railroad company requested the court to charge as follows: "If you find that at the time the plaintiff, Raymond Gilbert Marsh, received his injury, he was on the property of the railroad company for no purpose except to place the north switch light in position, pursuant to the request of the station agent, Swinehart, then I say to you that the fact that the railroad company had permitted the public to travel over this part of its property without objection would not entitle the plaintiff to receive at the time of his injury that degree of protection from injury which such public would have been entitled to receive, nor that degree of protection he would have been entitled to receive had he been upon the property as one of the public." This request was refused and the court charged the jury upon the same subject as follows: "And I say to you further upon this point that it is negligence for the servants of such railroad company, wantonly and needlessly, and without notice, warning, or other precaution, to place and leave exposed to observation, at such point or place on its railroad where the public, including children, are and have been so permitted by the company to travel and pass, an apparently harmless, but in fact highly-explosive and dangerous, object, like a signal torpedo, easily picked up and handled by children and likely to attract them, and known to such servants to be such. The question, therefore, gentlemen, comes to this: It is admitted that this boy was injured by the explosion of a signal torpedo on the railroad track. The plaintiff charges that it was placed there and left unexploded, and that at that time and place, and under those circumstances, the track having been commonly used for a long time by the public and by children as a passageway, with the knowledge of the defendant, and with its permission, and that the defendant was guilty of a want of ordinary care in such use of

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ant to Assist.



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its property, and by placing this torpedo upon its tracks and permitting it to lie there unexploded, whereby the plaintiff was injured. Now, this is the plaintiff's claim. \* \* \* The burden of proof, as I have stated to you, is upon the plaintiff to establish these propositions by a preponderance of the evidence. He must show you that the railroad company permitted its tracks and right of way to be used by the public and by children in the manner that I have already stated to you, and that while he was there upon that track, or passing along the same, under the circumstances stated in his petition, that he was injured by the explosion of this torpedo, and that the torpedo was placed there and left unexploded by the defendant, its servants or agents." Proper exceptions were saved to this charge, and to the refusal of the court to charge as requested. The court erred in refusing to charge as requested, and in the charge as given, and in refusing to rule out the evidence as to the travel of the public, including children, upon and along the railroad, and also in receiving such evidence. The error occurred by regarding the principles of the case of *Harriman v. Railway Co.*, 45 Ohio St. 11, 12 N. E. 451, as applicable to the facts of this case. In that case an unexploded signal torpedo was knowingly and recklessly left on the railroad track at a point where the public, including children, had for years been permitted to cross the track, using it as a path of travel, and the torpedo was picked up by a boy at that place while using the path of travel in the usual manner, as one of the public passing and repassing along the same; while in the case at bar the torpedo was not picked up by the boy while passing along and upon the railroad track as one of the public, but while going upon the track in the performance of his engagement with the station agent, to light the lamp at the switch stand. His being upon the track at that time was not induced by the fact that the track had been used for years as a line of travel by the public, but by reason of his engagement to light the lamps. His rights and the liabilities of the railroad company would have been the same if the track of the railroad company had never been used as a line of travel, or if the injury had occurred while the boy was going to the switch stand south of the highway, where the railroad was not used as a line of travel, so far as appears in this case. The principle is the same as that held in *Kelley v. City of Columbus*, 41 Ohio St. 263, 270, where the court say: "If there had been a business room in the building, or upon another part of the lot, which would have been an implied invitation to the public to go there, it still would not help the plaintiff, when he admits that he did not go upon the lot for any such purpose."

Counsel for the railroad company also requested the court to give the following charges to the jury, which were refused, and exceptions taken: "(2) I say to you further that if you find that he was upon that part of the property of the railroad company where he received his injury, at the time he

received his injury, only for the purpose of placing the north switch light in position at Swinehart's request, then his right to be there was no greater than that of a licensee, and the company was under no obligation to do more than refrain from inflicting willful injury upon him. (3) I say to you further that, if you find that plaintiff was at the place where the injury was received for no purpose except to carry out the request of Swinehart as to the switch light, then and thereby he assumed all risk of injury, short of willful injury, that might result from the negligence of any servant of the company. (4) If you find that any member of the train crew of the local freight train which reached Myersville between twelve and one o'clock p. m. on the day of the accident left an unexploded torpedo upon the property of the railroad company, where the plaintiff received his injury, which torpedo was found and exploded by the plaintiff at that place while there pursuant to the request of Swinehart to place said north switch light in position, and in consequence thereof he received the injuries complained of, then I say to you further that such act of said member of that train crew would not constitute negligence of the company, of which the plaintiff could in law complain. (5) The petition in this case does not aver that the defendant had knowledge of the fact that the plaintiff was lighting and carrying the switch lamps back and forth along the railroad, or that the plaintiff was going back and forth along the railroad for any purpose; and, unless you can find from the evidence that the injury to the plaintiff was willfully and intentionally caused by the defendant, then your verdict should be for the defendant." There was no error in refusing these requests. The requests are all founded upon the theory that one who, upon request, voluntarily assists the servant of a corporation in the performance of his duties without the knowledge of the officers, the servant having no authority to procure such assistance, is a volunteer, and can recover from the company only for willful injuries inflicted upon him. Upon the hearing this view was persistently urged by counsel for plaintiff in error, both in their brief and upon oral argument. Where a person, at the request of a servant of a corporation, assists such servant in the performance of his work, without any purpose or benefit of his own to be served by such assistance, he is regarded as a mere volunteer; and the requests to charge would be applicable to such a case. But where he has a purpose or benefit of his own to be served by such assistance, in addition to the purpose of assisting the servant, he is regarded as acting in his own behalf, with at least the acquiescence of the company. A trespasser who is upon the company's premises wrongfully, and a mere volunteer, stand upon substantially the same footing, and are entitled to recover only for such negligence as occurs after the servants of the company discover their perilous situation; that is, for willful or intentional injury. But there is a class between mere volunteers and

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trespassers, and partaking somewhat of the characteristics of each; that is, where the person assists the servant at his request, not only for the purpose of assisting in the work of the master, but also for a purpose and benefit of his own. In such cases it cannot be said that he is wrongfully upon the premises, because he is invited by the servant in charge. The master may not have assented, but neither has he dissented; and being there upon the invitation of the servant in charge, and there being no dissent of the master, he is regarded as being there by sufferance. And, being there by sufferance, he is rightfully there for the double purpose of aiding the servant, and thereby furthering the interests of the master, and of furthering his own private interest in his own behalf and for his own purposes and benefits. In such cases the person so assisting cannot be held to thereby become a servant of the master, because the servant inviting such assistance has no power or authority to employ other servants, and therefore the law of fellow servants is not applicable. As such assistant is not a trespasser, and not a fellow servant, and not a mere volunteer, the law assigns to him, without name, the position of one who, being upon the premises of another by the sufferance of such other, performing labor or service for his own purpose and benefit in his own behalf, is entitled of right to be protected against the negligence of the owner of the premises or his servants. The case of *Railway Co. v. Bolton*, 43 Ohio St. 224, 1 N. E. 333, was decided upon this principle, although the principle is not very clearly stated in the report of the case. The case of *Eason v. Railway Co.*, 65 Tex. 577, belongs to the same class. The court in that case say: "The principle upon which a recovery is allowed is this: The injured person is not a volunteer, but engaged, at the request or with the permission of the railway's agents, in a transaction of interest as well to himself or his master as to the railroad company, and this entitles him to the same protection against the negligence of the company's servants as if he were at the time attending to his own private affairs. Though performing a service beneficial to both, he is doing so in his own behalf, and not as a servant of the company. The request or acquiescence gives him the right to perform the service. The fact that he acts in his own behalf, however beneficial his labors may be to the company, gives him the right to be protected against the negligence of the company's servants." There is also a clear explanation of this principle in *Church v. Railway Co.*, 50 Minn. 218, 221, 52 N. W. 647, 16 L. R. A. 861. Many other cases illustrating this principle in its application to different facts are found in the above cases, and in cases cited by counsel in their briefs, and which the reporter will carry into the report of this case. As the boy in this case, by his engagement with the station agent, was to perform a service in lighting and cleaning the lamps beneficial to the company, on the one hand, and to himself, on the other, as he was

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to receive and did receive pay from the agent for his services, we think that he was on the railroad at the time of the injury by the sufferance of the company,—not as a servant of the company, nor as a trespasser, nor as a mere volunteer, but as one performing a service in his own behalf, and for his own purpose and benefit,—and entitled of right to be protected against the negligence of the servants of the company.

One case is cited by counsel for defendant in error, and we know of no other (*Rhodes v. Banking Co.*, 84 Ga. 320, 10 S. E. 922), where it is in effect held that where a child under the age of discretion assists, upon request, the servant of a

Tracks—Right to  
Complain of  
Defects.

railroad company in the performance of his duties, without any purpose or benefit of his own to be subserved thereby, and therefore a mere volunteer, and is injured by the negligence of such servant while in the act of assisting him, the company is liable to such child in damages. Whether this decision was induced by the statutes of that state does not clearly appear, but it probably was, because, in addition to their statutes as to children under the age of discretion, referred to in the opinion, section 3033 of their Code provides as follows: "A railroad company shall be liable for any damages done to persons, stock, or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." The injury in that case occurred in moving a freight car. This section is broad enough to make a railroad company liable to mere volunteers, whether adults or infants, and yet it is conceded in the opinion that a mere volunteer cannot recover. The exact ground of the decision is not clearly pointed out, and whether the courts of this state would go to the extreme limit of that case may well be doubted. But we are not required, however, in the case at bar, to go to the extent of the Georgia case, because here the boy had a right to be protected against the negligence of the servants of the company upon the principles hereinbefore stated. As the company had employed a proper person for station agent, it had the right to rely upon him, and presume that he would perform his duty as to lighting and cleaning the lamps, and it was not bound to anticipate that the station agent would employ a boy of tender years to perform that duty for him, and therefore it was not bound to keep its right of way in a safer condition than would have been required in case the station agent had attended to the lights himself. If, however, the company had knowledge that the boy was actually performing that service, and for that purpose was daily passing over and along its track, it was bound to anticipate that an unexploded signal torpedo upon its track.

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might be picked up and exploded by him, to his injury; and the leaving of such torpedo upon the track, either wrongfully or negligently, by the servants of the company, would be such negligence as would, in case of injury to the boy by reason thereof, sustain an action against the company.

Counsel for defendant in error have cited and strongly urged the cases of *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 44 N. E. 238, 32 L. R. A. 736, and *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.*, 60 Ohio St. 560, 54 N. E. 528, but those cases are not applicable to the case at bar. The principle of those cases and *Fletcher v. Rylands*, L. R. 1 Exch. 265, upon which they are founded, is, that if the owner of a dangerous animal or substance allows it to escape, or sends it from his own premises upon the premises of another, he is liable for all proximate damages resulting therefrom. In the *Defiance Water Co. Case*, water was allowed to escape, and in the *Bradford Glycerine Co. Case*, force or concussion was allowed to escape to the premises of another, and it was held that proper damages might be recovered. The following cases throw some light upon the rights of the parties where some substance is cast upon the premises of another: *Iron Co. v. Tucker*, 48 Ohio St. 41, 26 N. E. 630, 12 L. R. A. 577; *Collins v. Gas Co.*, 131 Pa. St. 143, 18 Atl. 1012, 6 L. R. A. 280; *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177; *Kelley v. Oil Co.*, 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765. In the case at bar nothing was sent or allowed to escape from the premises of the railroad company, but the injury occurred upon its own premises. The boy came to the dangerous object, instead of its escaping and going to him. The principles governing the two conditions are very different. As signal torpedoes are necessary in the operation of trains on railroads, the possession of them by men of the train crew cannot be regarded as negligence, and it cannot be presumed that they are negligently used; but negligence in such a case, as in all others, must be proved either by testimony directly establishing the fact, or by the proof of facts from which such negligence will reasonably follow and be presumed. The jury cannot be allowed to guess that there was negligence, without some proof thereof, either direct or inferential. For the errors above pointed out, the judgments of the lower courts are reversed, and the cause remanded to the court of common pleas for a new trial. Judgments reversed.

Negligence—  
Sufficiency of  
Evidence.

*Williams, J. (dissenting).* The purport of the instruction requested by the defendant, the refusal to give which is made a ground for reversing the judgments below, is, in its application to the facts of this case, that because the plaintiff, when he received the injury of which he complains, was on the defendant's railway at the instance and procurement of the agent of the company, it was absolved from the duty of observing ordinary care for his protection, and liable only for willful

injury. It is to the maintenance of that proposition that the argument in the briefs for the plaintiff in error is chiefly directed. The statement of the proposition, as there made, is that, as the jury specially found "the evidence did not show that the boy [the plaintiff] was upon the property of the company for any purpose except the performance of his contract with the station agent, the proper person for the boy to look to for protection or indemnity would be the person [the agent] who sent him into danger," and that "under these circumstances the company owed him no duty of protection, except against willful injury." The evidence shows that the defendant had intrusted to its station agent the duty of keeping lighted a switch some distance from the station at all proper times, the method of doing which was by placing there at night lighted lamps that were left in the agent's custody for that purpose. These lamps were carried from the station to the switch in time to be lighted before dark, and the next day taken back to the station to be cleaned and made ready for use at the switch at night. The defendant's agent, who had the full charge of this work, employed the plaintiff, a boy 10 years of age, to carry the lamps both ways between the station and the switch. He had been performing that service daily for several months before receiving his injury. While so engaged he was frequently noticed on the railway by the defendant's employees in charge of and operating trains over the road at that place; and the jury found, in response to an interrogatory submitted by the defendant, that prior to the plaintiff's injury the conductors, engineers, and brakemen of the defendant's trains had opportunities to know that "the plaintiff was accustomed to pass up and down the track to attend to the switch lights." It was while the plaintiff was upon the defendant's railway in the performance of this work that he found the torpedo and was injured by its explosion.

Independent of the plaintiff's right to go upon the railroad at that place, because it had, by the acquiescence of the defendant, practically become a generally traveled highway, he was in no sense a trespasser or wrongdoer. Though the contract with the defendant's agent was not binding on the company, for want of authority on his part to make it, and no contractual relation existed between the company and the plaintiff, he was nevertheless there in the performance of a service for the company at the express invitation of its agent, in whose control that service had been placed by the company. Even if notice to the defendant's station agent of the presence of the boy on the railway under those circumstances, and of his daily custom of passing along the track while engaged in the work he was so employed to do, should not be held sufficient to charge the company with notice of such use, the defendant otherwise had the means of knowing, by the exercise of ordinary care, that the plaintiff, in the performance of his service, was required and accustomed to go from the

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station to the switch and back, and thus necessarily pass along the company's track, from which it might properly be inferred that the defendant acquiesced in that use of its track. And a person of ordinary prudence would reasonably expect that the boy would pick up an attractive article, like an unexploded torpedo, left exposed at that place, and, following his childish instincts, would be likely to handle and explode it. The company should therefore be held to the use of ordinary care to prevent the exposure of the boy to that situation of danger. *Harriman v. Railroad Co.*, 45 Ohio St. 11, 12 N. E. 451; *Railway v. Shields*, 47 Ohio St. 387, 24 N. E. 658, 8 L. R. A. 464; *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257. Besides, it is held in the majority opinion in this case, as I understand it, that as the plaintiff, when he was injured, was on the defendant's road in pursuance of his engagement with the station agent, in the performance of a service for the benefit of the company, of which the agent had control, the duty of due care to protect the plaintiff against injury rested upon the company. In that opinion it is said that "as the boy in this case, by his engagement with the station agent, was to perform a service in lighting and cleaning the lamps beneficial to the company, on the one hand, and to himself on the other, as he was to receive and did receive pay from the agent for his services, we think that he was on the railroad at the time of the injury by the sufferance of the company,—not as a servant of the company, nor as a trespasser, nor as a mere volunteer, but as one performing a service in his own behalf and for his own purpose and benefit,—and entitled of right to be protected against the negligence of the servants of the company." In either view of the case, therefore, ordinary care was the measure of the defendant's obligation to the plaintiff; and the refusal of the court to charge, as requested, that the company was liable only for willful injury, was not error.

The doctrine of fellow servants appears to be inapplicable to the case. The cause of action arose in April, 1896, and the action was commenced in August of that year. The negligence charged as the proximate cause of plaintiff's injury is not that of the station agent, but is that of the defendant's employees in charge and control of its trains,—a separate and distinct department of its service; so that under our statute they were neither fellow servants of the station agent nor of the plaintiff, if he may be called the servant of the company at all.

The reversal of the judgments for error in the charge given by the court is based on the proposition that because the plaintiff, when injured, was on the defendant's roadway under his engagement with the station agent, he lost the right which he otherwise had as one of the public that used the railroad, with permission of the company, as a traveled highway. If, however, as held in the majority opinion, the plaintiff was rightfully on the railroad track when he was injured, because

he was there in pursuance of his engagement with the defendant's agent, and that gave him the right to protection from the negligence of the defendant, it would seem to be unimportant that he should have that right for any other reason; for, if the company was liable for its negligence upon the ground stated, the plaintiff was entitled to recover upon proof of such negligence, and no contributory negligence appeared, although he was not then in the use of the track as one having the right to it as a generally traveled way. In that view of the case the portion of the charge in question was unavailable as a ground of error, because immaterial. But no reason is given, nor is any perceived, why both rights may not co-exist, nor why the exercise of one should destroy the other. Indeed, the use of the railroad track by the plaintiff when pursuing his employment with the station agent was a use of it as a way of travel; and his right to use it as a traveled way was not impaired, nor that nature of its use changed, by the fact that the defendant's agent requested him to make that use of it, any more than it would be if he traveled over the track at the request of any other person, or on an errand for his parents, or on his way to school. The only effect of his employment by the defendant's agent was to give him an additional ground for claiming that he was lawfully on the railway when he received his injury. But if it were otherwise, and he was on the railroad only in pursuance of his employment, he was, as has been seen, lawfully there, and on that ground entitled to recover in his action, if without fault on his part his injury was caused, as he claimed, through the negligence of the company in the use of the torpedo; and hence, it became not only proper, but necessary, that the jury should be instructed as to what would constitute negligence in the use of such dangerous instruments by a railroad company where children should be expected to go. The instruction which the court gave on that subject is part of the charge for which the judgments below have been reversed, and is as follows: "It is negligence for the servants of such railroad company, wantonly and needlessly, and without notice, warning, or other precaution, to place and leave exposed to observation at such point or place on its railroad where the public, including children, are and have been so permitted by the company to travel and pass, an apparently harmless, but in fact highly-explosive and dangerous, object, like a signal torpedo, easily picked up and handled by children, and likely to attract them, and known to such servants to be such." This portion of the charge is taken from the syllabus in the *Harriman Case*, supra. Its soundness as a proposition of law is not disputed. Its principle has been accepted and approved in many cases, not only in this state, but in other states generally. Its applicability to this case, in either view that has been taken of it, seems evident. Beyond that instruction and the statement of the plaintiff's claim, there is



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nothing more in the charge complained of, except that the burden was on the plaintiff to show "that the railroad company permitted its tracks and right of way to be used by the public and by children in the manner that I have already stated to you, and that while he was there upon that track, or passing along the same, under the circumstances stated in his petition, that he was injured by the explosion of this torpedo, and that the torpedo was placed there and left unexploded by the defendant, its servants or agents." Certainly it was not improper for the court to charge the jury that the burden was on the plaintiff to show that he was injured by the explosion of the torpedo, and that it was placed on the track where found, and left unexploded, by the defendant, its servants or agents, as alleged in the petition. That burden was indisputably upon the plaintiff. The objection can only relate to that part of the charge which placed on the plaintiff the burden of proving "that the railroad company permitted its tracks and right of way to be used by the public and by children" as a public, traveled way; and the ground of the objection stated is that it was not applicable to the case, because the plaintiff, when injured, was not using the track in that way, but was using it in pursuance of his engagement with the station agent. If the plaintiff had the right to claim that he was lawfully upon the railroad when he was injured, because it had become a public traveled highway at that place by the defendant's permission, then, it is conceded, this charge would be correct, pertinent, and material. And, if his right to be on the track is restricted to the ground that he was there in the performance of his engagement with the defendant's agent, under the rule declared in the majority opinion, the proof required by this instruction was wholly unnecessary to his recovery. It simply imposed upon him a burden that was not incumbent on him, and in this respect might be harmful to him, but the imposition of such unnecessary burden on him could in no way be harmful to the defendant. On the contrary, it gave the defendant an additional chance of escaping liability at the hands of the jury, if the plaintiff failed to make the proof required by the instruction,—a chance to which the defendant was not entitled. Instead, therefore, of this instruction being prejudicial to the defendant, it might have proven beneficial. In any aspect of the case, the charge given affords no ground for a reversal of the judgment.

The testimony held to be incompetent relates to a transaction and conversation between a person of whom the witness speaks as a "trainman" and the agent in charge of the defendant's railroad station, by which the former obtained from the latter, in the station, a signal torpedo. These instruments are kept by the agents at railroad stations for the use of trainmen for giving signals in the operation of trains. The testimony is held incompetent because the witness did not first qualify himself to speak of the person referred to as a

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"trainman." The occurrence to which the testimony relates took place at the station near which the plaintiff was injured, and at a time when a freight train had recently arrived. That station is situated in a small village, where few persons went; and the agent appears to have attended to all business at the station,—even to the lamps at the switch, some distance away. No other employees were required. These facts were before the court and jury when the witness testified. The identification of a trainman is not the subject of expert testimony. The identity of a conductor or engineer passing from a train just arrived, into the station, is as obvious to common observation as that of a policeman on his beat in a city. And it would seem as unnecessary to the competency of testimony of the acts of the former, for whose use signal torpedoes are kept, in obtaining such instruments of the agent at the station where they are kept for that purpose, that the witness should first testify he knew the person to be a conductor or engineer, as it was that he should first testify he knew the person in charge of the station to be the station agent, or would be that he knew a policeman when he saw one, before he could testify that he saw a policeman make an arrest. If there was any doubt of the accuracy of the witness' knowledge on the subject, he was open to cross-examination; and the weight of his testimony in that respect, as well as in all others, was for the jury. For these reasons, I am unable to concur in the majority opinion or in the judgment.

Minshall, J., concurs in the dissenting opinion.

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DORSEY

v.

KANSAS CITY, P. & G. Ry. Co.

(*Supreme Court of Louisiana, Jan. 21, 1901.*)

[29 South. 177.]

**Railroads—Trespasser on Train—Violent Removal—Contributory Negligence.**\*—Defendant appeals, and asks for the review and reversal of a judgment condemning it to pay damages to the plaintiff, who is the widow of the deceased. Defendant's brakeman, instead of waiting a few moments to oust a trespasser after a stop of the train, chose to pelt him with rocks and clods to make him get off the rods where he was riding, stealing a ride, under the car. The trespasser, in endeavoring to escape from under the car while it was running, fell, and was killed. It was within the course of the brakeman's employment to compel him to stop

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\**Jackson v. St. Louis S. W. Ry. Co. (La.)*, 18 Am. & Eng. R. Cas., N. S., 444, and *foot-note*.

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trespassing and leave the car, and, had he exercised the right in a proper and legal manner, there would have been no good cause to complain. The damage arose from the manner of the removal. It was unnecessarily violent, and illegal. The act of trespassing was not of itself contributory negligence justifying defendant's servant to resort to the acts he did, when there is not the least reason to infer that there was necessity to resort to any violence at all to remove the trespasser.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; A. D. Land, Judge.

Action by Margaret Dorsey against the Kansas City, Pittsburg & Gulf Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Alexander & Wilkinson, for appellant.

Wise & Herndon and Charles W. Elam, for appellee.

Breaux, J. Plaintiff brought his suit to recover \$5,000 damages for the death of her husband, who was killed while stealing a ride on defendant's train. The record discloses that a brakeman of the defendant company threw stones or clods at plaintiff's husband, who was riding on the rods of one of the box cars about midway of the train. It appears that the local freight train of the defendant company going north was at or near Mansfield, La., running at the rate of about six or seven miles an hour, and that when the engine passed the switch target a brakeman alighted to the ground from the engine to change the switch and let the train in on the side track out of the way of a coming passenger train. As this freight train was passing by the switch, this brakeman saw Marshall Dorsey riding under the box car. It was then, while he was under the car, that he pelted him with stones or clods, hitting him twice. Dorsey then attempted to crawl from under the car, struck his head against the platform, by which he was thrown across the track and run over by several of the cars. He made no attempt to get off the train until the brakeman threw rocks or clods at him. He was, by his fall, occasioned by his endeavors to escape the rocks or clods, severely wounded, suffered great agony, and lived about eight hours after the accident. On the part of the defense, testimony was offered of statements of the deceased that he had stolen rides for many years. Defendant denies that the death of plaintiff's husband was caused by any fault of its agents. It charged that plaintiff's husband came to his death by his own fault and negligence. Defendant also denied that the deceased was the husband of the plaintiff. The case was tried before a jury. The verdict awarded \$2,500 to the plaintiff. The defendant prosecutes this appeal from the verdict and judgment.

Defendant, in the first place, urged that Ryan, its brakeman, was not acting within the scope of his employment; that,

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in order to recover, it was incumbent upon the plaintiff to show affirmatively that this brakeman was acting within the scope of his employment; that not only this proof was not made, but that the brakeman testified that it was not part of his duty to put trespassers off of the train, his duty being to report trespassers to the conductor for such action as this officer might deem proper. In order to retain the full force of the defense, the defendant requested the judge of the district court to instruct the jury, in delivering his charge, that, if they found that no contractual relations existed between the deceased and the railway company, then the company was not responsible for any acts of its brakeman outside of the scope of his employment. The judge refused to give this charge, but, on the contrary, instructed the jury that the removal of trespassers from the cars, as a matter of law, is within the implied authority of the company's servants on the train, including the brakeman. Defendant complains of the charge as being erroneous. At the outset, we find no difficulty, after having considered a number of decisions upon the subject, in arriving at the conclusion that, even though one be a trespasser on a train, he should not be expelled in such a manner as to expose his life or do him great bodily harm. This point has been considered and passed upon twice recently. While a mere trespasser is not entitled to the consideration and protection of those who are not trespassers, yet they should not be treated with unnecessary harshness and violence. No one, in the exercise of his right, is authorized to resort to unnecessary force. This court said, in *Young v. Railway Co.*, 51 La. Ann. 295, 25 South. 69: "A trespasser on a railroad train must be ejected at a place not perilous for one alighting in the nighttime." Again, in *Jackson v. Railroad Co.*, 52 La. Ann. 1706, 28 South. 241: "Upon the other hand, if he was forcibly ejected by any one for whom the defendant is responsible, he is entitled to recover, no matter why he got on the train, since there is no law authorizing the taking off of a boy's arm at the shoulder as a penalty for trespassing on railroad or any other property." The jurisprudence of the courts of several other states is equally as emphatic and to the point. "A trespasser—one stealing a ride—was ruthlessly removed and injured by a brakeman. The court held that this brakeman, as such, was acting within the scope of his authority." *Railroad Co. v. Kelley* (Kan.) 14 Pac. 172. And held further: "That, while the defendant had a right to remove the trespasser, but in so doing must exercise the right with ordinary care and prudence on its part, the mere fact that one is a trespasser was not such negligence as to relieve the defendant from this obligation."

This brings us to a consideration of the question directly placed at issue by the refusal of our Brother of the district court to charge that the removal of a trespasser is not within the expressed or implied authority of a brakeman, but charg-

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ing, on the contrary, that the removal of trespassers from cars, as a matter of law, is within the implied authority of the company's servants, including the brakeman. We take it that the rule exempting the master from responsibility is expressed in the following: When the employee, in carrying out a purpose of his own, does injury to another, not within the scope of his employment, the employer is not liable. We have not found it possible to hold that the act complained of falls within the grasp of this rule. The brakeman was not, at the time, seeking to protect his own, or resisting the act of a trespasser, in so far as he was concerned, but was acting for the employer, seeking to get rid of a trespasser, who had placed himself in an exposed position, dangerous to himself, and against every requirement of the rules regulating the business and operations of the defendant company. The act complained of was done in the course of his employment. We understand that the first duty of the brakeman is to apply the brakes, either to enable the car to move onward or to stop; but there are, we take it, other duties he is at times called upon to perform. He is under the direction of the conductor, who is himself responsible for the proper management of the train. Without an express order, we take it that in aiding to man the train properly he may, of his own motion, see to the removal of a trespasser who is stealing a ride suspended under the car on or very near the running gear of the cars, in the condition of which the brakeman, as an employee, must, to some extent, be concerned. With reference to the liability of the defendant for the acts of its brakeman, the court of appeals of New York held that the defendant is responsible unless the brakeman used his authority for a mere cover for accomplishing an independent and wrongful purpose. *Hoffman v. Railroad Co.*, 87 N. Y. 31, citing a number of authorities in support of this proposition. The decision in *Pierce v. Railroad Co.* (N. C.) 32 S. E. 399, 44 L. R. A. 316, is directly in point. The tortious act complained of in that case was the act of a brakeman of a railroad company. The Civil Code prescribes that "masters and employers are answerable for the damage occasioned by their servants and overseers in the exercise of the function in which they are employed." The liability must be limited within due bounds, but not to the extent, however, of holding that the employee is not acting within the scope of his employment who, as in this case, removes one from a place directly under his eye as a brakeman in charge, to some extent at least, of the brakes and the part of the car to which their force and effect extend.

The defendant calls our attention to the fact that the article just quoted further provides that "even then the master is not responsible, unless he could have prevented the damage and did not do it." This article has of late years been invoked both in the courts of this state and in the federal courts. The view pressed upon our attention was not sustained. It was held

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in repeated decisions that the employer is constructively present; that the management is his, for him, or in his interest; and that he cannot avoid liability by the plea that he was not present at the moment of the accident. The master or employer is present by his management and by the effect of the employment of one to serve his interests. The agent intrusted with the performance of a duty occupies the place of the corporation, which is deemed present. *Mattise v. Manufacturing Co.*, 46 La. Ann. 1535, 16 South. 400. The removal itself of the trespasser was proper. The act of removal was the cause of damage. In consequence, this cause does not fall under the rule laid down in *Williams v. Car Co.*, 40 La. Ann. 87, 3 South. 631, cited by the defendant. In the cited case the "porter or brakeman" was not called upon to perform any duty in which the defendant company was concerned. He brutally assaulted a stranger, one between whom and the defendant there existed no contractual relations. The wrongdoer acted entirely from malice, unconnected with anything due by him to the company. His employment contemplated no such act as that of which he was guilty. Here the brakeman was seeking to oust a trespasser who was trespassing upon the property of his employer. Defendant cites several decisions rendered before commerce was as active as it is now, and prior to the employment of active and frequently dangerous modes of transportation. The earlier doctrine has necessarily undergone some change owing to the change of conditions and dangers. "The earlier doctrine has been greatly modified." This being our conclusion on this point, we deem it useless to review the cited decisions in cases in which the employee was not acting within the course of his employment. We are decidedly of the opinion that the character of the employment placed the onus of proof on the defendant, showing that its brakeman was not expected to and never exercised any supervision over the appliances under the cars.

We do not gather from the evidence that there is the least merit in the allegation of defendant that plaintiff was not the wife of the deceased.

We are now to consider the amount which has been awarded, and determine whether it should be increased or reduced. Plaintiff asks for an increase, and defendant, on the other hand, complains of the amount, and urges that it is too large. The jury, by its verdict, has fixed the amount. We have determined, in view of the facts of the case, to let it remain. For the reasons assigned, the verdict and judgment are affirmed at defendant's costs.

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EGAN

v.

MONTANA CENT. RY. CO. *et al.**(Supreme Court of Montana, Jan. 7, 1901.)*

[63 Pac. Rep. 831.]

**Use of Tracks as Footpath—Duty to Lookout for Trespassers—Nonsuit.\***—Defendant operated a spur track extending to a mine about a mile from town. Plaintiff and other mine employees were in the habit of walking into town on the track, and plaintiff, while so walking with other employees, was knocked down by a train. The engineer was looking back for a signal, and did not see the men, and the noise of the train was drowned by the mine whistle. *Held*, that plaintiff was properly nonsuited, since he was a trespasser, and defendant was not obliged to keep a lookout to avoid injuring him.

**Same—Licensees—Effect of Mere Failure to Prohibit.**—The fact that a railroad company which operated a spur track a mile in length to a mine tolerated the use of the track as a footpath by the mine employees in going to and from work, without any expressed or implied invitation to so use it, did not entitle such employees to the rights of licensees.

Appeal from district court, Silverbow county; John Lindsay, Judge.

Action by Michael Egan against the Montana Central Railway Company and another. From an order denying a new trial, and from a judgment in favor of defendants, plaintiff appeals. Affirmed.

John W. Cotter and Howell & Harney, for appellant.

A. J. Shores, for respondents.

Pigott, J. Having sustained personal injuries through the alleged negligent operation of a train of cars by the defendants, the plaintiff brought this action for damages. At the close of the plaintiff's case the court granted a nonsuit, and judgment was entered in favor of the defendants. From an order denying plaintiff's motion for a new trial, and from the judgment, the plaintiff has appealed.

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\*As to duty to trespassers upon track, see *New York, etc., R. Co. v. Kelly* (C. C. A.), 13 Am. & Eng. R. Cas., N. S., 816, and *foot-note*; *note, Id.* 824 *et seq.*

As to duty of trainmen to maintain lookout where track is habitually used by pedestrians, see *Garver v. Trumbull* (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 589, and *foot-note*.

The single question is whether the plaintiff made a sufficient case to go to the jury, and in considering this question everything which the evidence tended to prove must be taken as established. So viewing the evidence in connection with the pleadings, the following facts, which we adopt, in substance, from the briefs of counsel, appeared: The defendants were operating a line of railway which ran on the south side of the Boulder river, and into and through the town or village of Basin. The Hope mine and mill, where the plaintiff was employed on December 30, 1894, when the accident occurred, was situated about a mile above Basin, and immediately adjoining the right of way of the defendants; and at that point the railway was near the bank of the river, while the mine and mill were on the hillside immediately above, with only sufficient intervening space for a spur track and platform, which had been constructed for the use of the mine. Between the mine and Basin the roadbed of the defendants was high and narrow, being wide enough for a single track only. At the foot of the grade on the north side ran the Boulder river, and on the south side was a pond or slough. On the south side of the river the railway grade was the only road or path over which a man could walk between the mine and Basin. This grade, however, did not afford the only roadway between the Hope mine and the town, for there was a wagon bridge about 175 feet above the mine, and near the bridge was a road on the north side of the river leading down to the town. Notwithstanding the existence of the upper road, the miners and other inhabitants of Basin habitually used the railway track for going to and coming from the mine. Two shifts of from 30 to 35 men each were employed at the mine, and these men passed over this portion of the railway twice, and sometimes four times, a day. The railway track had been so used as a pathway for more than a year prior to the accident, and during that time the defendants had known, or possessed the means of knowing, that their track was frequently so used, but took no steps to prevent the trespasses. On the day of the accident the miners, including the plaintiff, quit work at noon, and started down the railway track towards Basin while the whistle at the Hope mine was blowing. The plaintiff stepped upon the track at the mill, and looked to see if there were any trains upon the track, because, as he testified, "there was trains liable to come along any time," and walked slowly towards town. He walked in the middle of the track, following the other men, 12 or 15 in number, who were ahead of him. He walked north about 150 feet before he was struck. The view of the track was unobstructed to the south for a distance of 800 feet or thereabouts. After he started to walk towards town, he did not look back. The freight train which struck him was running at the rate of about 20 miles an hour. The whistle was not blown or bell rung, nor was any signal or warning given. The engineer was leaning out of his cab,



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looking backward for signals from the rear of the train. The man immediately in advance of the plaintiff turned half way around, and jumped from the track just as the engine struck the plaintiff. At the moment he was struck the whistle of the mill obscured or rendered indistinct minor noises. The plaintiff had often been on that track before when trains had passed along. The men who were ahead of him at the time of the accident were either in the center of the track or close to the track on the end of the ties.

The first question is, were the defendants guilty of negligence proximately causing the injury? Counsel for the plaintiff insist that the defendants were negligent in failing to give notice or warning of the approach of the train. Whether they were or not must, under the facts, be determined by the answer to the question whether the omission of the defendants to observe the presence of the plaintiff on the track in time to warn him of the approach of the train was an act of negligence. It is contended that the defendants were under the legal obligation to maintain a lookout when the train was approaching the stretch of track upon which persons were in the habit of walking, and to give such notice or warning of the approach of the train as would have permitted the plaintiff to escape from his position of peril. It appears that the plaintiff and others had been in the habit of using the defendants' track as a footpath. The right of way at the point where the accident occurred was the exclusive property of the defendants. Without their consent, the plaintiff could not lawfully use that part of the track for his own convenience. Neither the plaintiff nor the other persons were expressly or by implication invited to walk upon the track. Forbearance is not ordinarily permission. It may be equivalent to permission when the law imposes upon the person who forbears the active duty not to forbear. Passivity is not assent, unless legal duty demands speech or action. Silence or nonaction is implied consent only when legal obligation requires speech or action to evidence objection or protest; in other words, silence or nonaction is not of itself alone evidence of assent, unless legal duty demands speech or action as the expression of dissent. *State v. Fisher*, 23 Mont. 551, 59 Pac. 919. Mere tolerance or endurance of past trespassers will not justify the inference that other acts of the same kind were licensed. No legal duty expressly to object to the use made of the track by trespassers rested upon the defendants; and hence, by omitting to warn or eject those who had theretofore intruded, they waived none of their rights, nor granted an implied license to the plaintiff authorizing him to do like acts in the future. The plaintiff and his companions were trespassers, and the mere fact that the defendants had, without formal or express objection, tolerated or suffered their use of the track as a footway, did not make the users licensees. The defendants owed to the plaintiff no greater or different duty

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than they owed to persons trespassing on other parts of their property. The defendants owed to the plaintiff, as they did to any other trespasser, the duty to refrain from any willful or wanton act occasioning injury, and the duty of exercising reasonable care to avoid injuring him after becoming aware of his presence on the right of way; but further than this the defendants were under no obligation to the plaintiff. In the case at bar the engineer at the time of the accident was looking backward for signals from the rear of the train, and did not keep a lookout for persons on the track; nor does the plaintiff contend that the engineer or any other employee of the defendants saw him in time to avoid striking him. The defendants were under no legal obligation to maintain an active lookout for the purpose of avoiding injury to the plaintiff, a trespasser, and there was, therefore, no breach of legal duty committed by the defendants in the omission; in other words, there was no negligence on the part of the defendants. This conclusion seems manifest, and support for it is found in *Railroad Co. v. Womack*, 84 Ala. 149, 4 South. 618; *Glass v. Railroad Co.*, 94 Ala. 581, 10 South. 215; *Railroad Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112; *Railroad Co. v. Jones*, 163 Ill. 167, 45 N. E. 50; *Railway Co. v. Perkins* (Ky.; not yet officially reported) 47 S. W. 259; *Spicer v. Railway Co.*, 34 W. Va. 514, 12 S. E. 553; *Railroad Co. v. State*, 62 Md. 479, 50 Am. Rep. 233; and *Ward v. Railroad Co.*, 25 Or. 433, 36 Pac. 166, 23 L. R. A. 715,—although in some of these cases the courts fail to observe the distinction, which is important, between mere toleration of continued trespasses and license by express or implied invitation. Upon principle the same doctrine seems applicable where trains are running through cities or thickly populated districts. *Glass v. Railroad Co.*, *supra*. As we have said, the plaintiff was not, in any proper sense of the term, a licensee; but, if it be conceded that at the time of the accident the plaintiff was upon the track by tacit permission only, without any invitation, express or implied, his case is not bettered, for he went and remained there at his own risk, and to such a licensee by sufferance or tolerance (if the expression may be used to describe the plaintiff) no duty was imposed by law on the defendants other or greater than they would have owed to a naked trespasser. Sound reason and the decided weight of authority are in accord with these views. *Sweeny v. Railway Co.*, 10 Allen, 368, 87 Am. Dec. 644; *Richards v. Railway Co.*, 81 Iowa, 426, 47 N. W. 63; *Weldon v. Railway Co.* (Del. Super.) 43 Atl. 156; *Settoon v. Railroad Co.*, 48 La. Ann. 807, 19 South. 759. Holding, as we do, that no inference of negligence on the part of the defendants could have been deduced from the facts, it follows that the question whether the plaintiff was guilty of contributory negligence is eliminated. The nonsuit was properly granted. The judgment and order refusing a new trial are affirmed. Affirmed.

Brantly, C. J., and Word, J., concur.

## SIMS

v.

## SOUTHERN RY. CO.

*(Supreme Court of South Carolina, Feb. 12, 1901.)*

[37 S. E. 836.]

**Subpoena Duces Tecum—Mortgage—Parol Evidence.**—Defendant subpoenaed N. to produce a mortgage, and N. testified that the mortgage had been paid by plaintiff, and that he did not know where it was. Plaintiff testified that the mortgage was at his home, six miles in the country. *Held*, that the defendant was not entitled to show the contents of the mortgage by parol, as no notice was given plaintiff to produce the instrument.

**Instructions—Hypothetical Statement of Fact.**—Where defendant requested instructions based on a hypothetical statement of facts, which properly stated what the law would be if the jury should find that the supposed facts existed, it was error to refuse the instructions as charges on matters of fact.

**Stock Killed beyond Crossing—Statutory Signals.\***—Where plaintiff's horse was killed 20 feet from a public crossing, a charge to the jury as to the statutory requirements to sound the whistle for public crossings constituted reversible error.

**Harmless Error.**—The fact that the trial court instructed the jury as to the law of contributory negligence, though defendant had not pleaded it, was not prejudicial to defendant, and constituted no ground for granting him a new trial, as it in fact gave him the benefit of a defense, which he had not pleaded.

Appeal from common pleas circuit court of Union county;  
O. W. Buchanan, Judge.

Action by Samuel Sims against the Southern Railway Company. From a judgment of the circuit court modifying a judgment of the magistrate's court in favor of plaintiff, defendant appeals. *Reversed*.

The following are defendant's exceptions: "(1) Excepts because the presiding judge erred, as matter of law, in failing and refusing to sustain defendant's second exception to the magistrate's judgment herein, to wit: 'For that the said magistrate erred, as matter of law, in excluding secondary evidence by defendant as to an alleged bill of sale or mortgage given by plaintiff over the mare in question, it having

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\*See *Southern Ry. Co. v. New* (Ga.), 14 Am. & Eng. R. Cas., N. S., 19, and *foot-note*.

appeared that the mortgagee had been subpœnaed duces tecum to produce the same, and it further appearing that the same was not then in possession of said mortgagee, but had been delivered to and was in possession of plaintiff himself, who, upon demand by defendant during the trial refused to produce the same.' (2) Excepts because the presiding judge erred, as matter of law, in failing and refusing to sustain defendant's eighth exception to the magistrate's judgment herein, to wit: 'For that the said magistrate erred in ruling as inadmissible and incompetent the question propounded to the witness Emslie Nicholson, "What did it cover?" the said witness having just testified that a bill of sale had been given to him, or assigned to him by Crawford & Aycock, executed by Samuel Sims, the plaintiff; whereas it is submitted that the witness Nicholson, being the mortgagee or party to whom the bill of sale had been assigned, and having testified that he did not then have it, and having been regularly subpœnaed by said magistrate duces tecum, this evidence was competent and admissible as going to show that plaintiff was not the owner of the mare in question,—an allegation of the complaint material to the case, and which defendant by its answer denied.' (3) Excepts because the presiding judge erred, as matter of law, in failing and refusing to sustain defendant's third exception to the magistrate's judgment herein, to wit: 'For that the said magistrate erred in refusing defendant's second request to charge: "That, if the jury believe from the evidence that the train which it is alleged struck the mare in question was running at a lawful rate, and had the customary appliances and force of trainmen, and the mare, when seen by the engineer, or might, with due care, have been seen, was so close that the train could not be stopped, with ordinary care and diligence, in time to avoid striking it, then the plaintiff cannot recover,"'—whereas it is submitted that the request set forth the law applicable to the case, and, having been refused by the magistrate, the jury was left entirely without any instructions as to the law which should guide them in passing upon the degree of care required of and used by the defendant in this case. (4) Excepts because the presiding judge erred, as matter of law, in failing and refusing to sustain defendant's fourth exception to the magistrate's judgment herein, to wit: 'If you find from the evidence that plaintiff's mare, or the mare in question, was grazing near the railroad track, and, becoming frightened at an approaching train, ran a short distance, and then jumped upon the track, and was struck and killed, and that ordinary care was used by the engineer after the animal was in danger of being struck, then your verdict must be for the railroad company.' The same, it is submitted, was a correct proposition of law applicable to the case. (5) Excepts because the presiding judge erred, as matter of law, in failing and refusing to sustain defendant's sixth exception to the magistrate's judgment herein, to wit:

'That, if the jury find there was a chattel mortgage over the animal in question, then the plaintiff cannot recover, because he is not the owner.' (6) Excepts because the presiding judge erred, as matter of law, in failing and refusing to sustain defendant's twelfth exception to the magistrate's judgment herein, to wit: 'For that the said magistrate erred in charging the requests submitted by plaintiff, to wit: "No. 1, quoting section 1685 of Revised Statutes, and request No. 2, quoting section 1692 of Revised Statutes; whereas it is submitted that, in view of plaintiff's admission as to the point of the accident, these requests were to the prejudice of defendant."' (7) Excepts because the presiding judge erred, as matter of law, in failing and refusing to sustain defendant's thirteenth exception to the magistrate's judgment herein, to wit: 'For that the said magistrate erred in charging the jury the plaintiff's third, fourth, fifth, and sixth requests to charge, submitted in writing. The same, it is respectfully submitted, having no application to the case at bar, resulted to the manifest injustice of defendant.' Plaintiff's third, fourth, fifth, and sixth requests were as follows: (3) When the statute requires the whistle of a moving railroad engine to be blown and its bell to be rung continuously for 500 yards before crossing highway, a failure to do so is evidence of negligence; and it is not necessary to prove the damages in dollars and cents, but from the facts and circumstances submitted to the jury they estimate the damages. (4) In an action under section 1692, Rev. St., against a railroad company for damages resulting from its negligence to blow a whistle or ring the bell, it is not necessary to show that such negligence was the proximate cause of the injury. (5) That by the term 'traveled place,' as used in the statute, is meant a place across which not only the public have been accustomed to travel, but where they have a right to travel; and all that the statute requires is that the neglect to give the prescribed signals shall contribute to the injury; and when a person is injured by collision with an engine of a railroad company at a crossing, and it appears that such company neglected to give the prescribed signals, such neglect contributes in law to the injury. (6) If the testimony satisfies the jury that the requirements of the act were not complied with, or imperfectly complied with, and such failure contributed to the casualty, then from such failure the jury can find that railroad company was negligent. (8) Excepts because the presiding judge erred, as matter of law, in failing and refusing to sustain defendant's fourteenth exception to the magistrate's judgment herein, to wit: 'For that the said magistrate erred in charging plaintiff's seventh request to charge, to wit: "That, the defense of the defendant railroad company being in part 'contributory negligence' on part of plaintiff, makes such defense an affirmative one, and must be proved by the railroad company as other affirmative defenses, to wit, by the preponderance or greater weight of their testimony;" whereas

it is submitted, no such defense as "contributory negligence" having been pleaded or interposed by defendant, such instruction from the court was erroneous, in that it submitted to the consideration of the jury a defense neither pleaded nor sought by the evidence to be made, and was to defendant's prejudice.' "

E M. Thompson, for appellant.

V. E. De Pass, for respondent.

McIver, C. J. This was an action, commenced in a magistrate's court, to recover damages for the killing of a horse belonging to plaintiff by the alleged negligence of the defendant company in the running of their train. The **Case Stated.** only defense interposed was a general denial, and the case came on for trial before the magistrate and a jury at Union, S. C., on the 7th of April, 1899, when the testimony set out in the "case" was adduced. That trial resulted in a judgment for the plaintiff for the sum of \$65, from which judgment defendant appealed to the circuit court on the several grounds set out in the "case." The circuit judge rendered judgment modifying the magistrate's judgment by reducing the same to the sum of \$44, and overruling all the other exceptions to the judgment rendered by the magistrate's court. From the judgment of the circuit court the defendant appeals to this court upon the several exceptions set out in the record, a copy of which should be incorporated by the reporter in his report of the case.

For a proper understanding of the points presented by appellant's exceptions it will be necessary to make a brief statement, derived from the testimony which is set out in the "case" of the circumstances under which the horse was killed, and as to the ownership of the animal, which is one of the questions in the case. It seems that on the day on which the disaster occurred, which is stated by plaintiff's witnesses to have been the 26th August, 1898, and by the defendant's witnesses the 16th August, 1898, the horse was turned loose in a pasture through or along which the railroad track ran, and when the train was approaching the horse ran upon the railroad track, and was struck and killed by the locomotive. There was a conflict of testimony as to whether the signals required by section 1685, Rev. St. 1893, to be given by a railroad train when approaching a point where the railroad "crosses any public highway or street or traveled place" were or were not given. Inasmuch, however, as it is stated in the "case" that "plaintiff admits that the animal was struck twenty feet below public crossing," we do not know that this conflict in the testimony as to whether the signals were given would be material.

The testimony as to the ownership of the horse was to the following effect: The plaintiff, as well as his son and daughter, all testified that the horse belonged to the plaintiff. But the

plaintiff, on his cross-examination, testified as follows: "I got horse from Mr. Crawford about last of February or first of March last year [1898]. This was John Crawford. I gave him \$44. Did not pay him cash. I gave a mortgage to Mr. Nicholson." Nicholson, who seems to have been subpoenaed duces tecum to produce said mortgage, being sworn, says: "I haven't got mortgage. It has been paid, and don't know where it is. I think a bill of sale was given me by Samuel Sims. It was signed [assigned?] to me by Crawford Aycock. Question. What did it cover? (Objected to by plaintiff. Overruled, and defendant excepts. Overruled by the court on ground that the mortgage itself is best evidence of its contents.)" Sam Sims, recalled, says: "I have the chattel mortgage. It is at home. I haven't it here with me;" and in the "case" we find the following statement of what occurred at the trial: "Defendant calls upon plaintiff and plaintiff's attorney to produce original mortgage. Plaintiff's attorney states that mortgage is not in his possession, or that of his client, but is six miles in the country. Defendant asks to allow secondary evidence to be produced thereof. Refused by the court on ground that mortgage is the highest evidence. Defendant excepts." It will be observed that the exceptions for the purposes of this appeal all impute error to the circuit judge in not holding that the magistrate erred in his rulings as to the admissibility of testimony, and in his charge and refusals to charge the jury, all of which is fully set out in the "case" in the several particulars pointed out in the exceptions to the judgment of the circuit judge.

In the light of the foregoing statement we will proceed to consider the several exceptions. The first and second exceptions, both relating to the alleged error in the ruling of the magistrate as to the admissibility of secondary testimony in relation to the contents of the mortgage above referred to, may be considered together. There can be no doubt that the mortgage itself constituted the highest and best evidence of its contents, and secondary evidence thereof would not be competent, unless it was first shown that the mortgage was either lost or destroyed, or from any other cause could not have been produced. But no testimony to that effect was offered, and, on the contrary, the testimony showed that the mortgage was still in existence, in the possession of the plaintiff at his home, six miles from the place of trial. It is true that Nicholson, who held the mortgage at one time, was subpoenaed duces tecum to produce the mortgage; but he testified that he did not have the mortgage; that it had been paid; when, he was not asked, and he did not say; and that he did not know where it was. But it does not appear that the plaintiff was ever served with any notice to produce the mortgage at the trial; and when called upon, during the trial, to produce the mortgage, the reply was that neither he nor his counsel could then do

Subpoena Duces  
Tecom - Mortgage  
- Parol Evidence.

so, as the mortgage was at his home, six miles distant from the place where the trial was in progress. This is not, therefore, like the case of *Reynolds v. Quattlebum*, 2 Rich. Law, 140, where it was held that, if the presiding judge is satisfied that a deed is in court in the possession of a party, and he fails to produce it upon notice given at the trial, the adverse party may offer evidence of its contents. There was, therefore, no error in refusing to receive parol evidence of the contents of the mortgage for the purpose of showing that the condition of the mortgage was broken, and that the plaintiff had thereby been divested of his right of property in the horse at the time he was killed, and could not, therefore, maintain this action. The first and second exceptions are overruled.

The third and fourth exceptions, relating to the same subject, may be considered together. These exceptions impute error in refusing defendant's second and fourth requests to charge certain propositions of law which seems to us unexceptionable, based upon hypothetical statements of fact.

Instructions—  
Hypothetical  
Statement of  
Fact.

The reason given by the magistrate for refusing these requests that involve matters of fact is not sound. The magistrate was not asked

to charge or state any matter of fact, but the requests were based upon what would be the law, under the facts supposed, if the jury believed, from the evidence, such supposed facts to be true. It seems to us, therefore, that the circuit judge erred in not sustaining these exceptions to the magistrate's refusal to charge.

Exception 5 has been very properly abandoned in view of the fact that there was no evidence that the condition of the mortgage on the horse had been broken at the time it was killed.

Exceptions 6 and 7, relating to the same subject-matter, may be considered together. They raise the point that, in view of the undisputed testimony—indeed, of the express admission

of the plaintiff on the record—that the horse was not struck “at a crossing,” it was error to give the jury any instructions as to the provisions of sections 1685 and 1692 of the Revised Statutes of

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1893, as these sections were designed only to provide additional safeguards for those who are injured, either in their persons or property, in crossing or attempting to cross a railroad track at a point where they have a right to cross such track, to wit, at a point where a railroad track “crosses any public highway, or street, or traveled place.” The cases of *Neely v. Railroad Co.*, 33 S. C. 136, 11 S. E. 636, and *Kinard v. Railroad Co.*, 39 S. C. 514, 18 S. E. 119,—especially the latter,—clearly support this view; and hence those sections were not applicable to the case, and it was error to charge the jury as to the provisions of those sections. This cannot be said to have been harmless error, for the provisions of those sections are much more stringent than in cases where damages



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are claimed for injuries done to one, either in his person or property, by a railroad company at points on its track other than "at a crossing," for in such cases the questions whether a given fact or facts amounts to negligence is a question for the jury, whereas in an action for damages sustained "at a crossing" by collision with a railroad train the failure to give the statutory signals required is declared by statute to be negligence, and in one case the plaintiff must show not only negligence on the part of the railroad company, but also that such negligence was the proximate cause of the injury complained of, whereas in an action under these sections the question of proximate cause is eliminated. *Wragge v. Railroad Co.*, 47 S. C. 105, 25 S. E. 76, 33 L. R. A. 191, recognized and followed in *Strother v. Railroad Co.*, 47 S. C. 375, 25 S. E. 272. When, therefore, these sections were applied to this case, it was well calculated to induce the belief that, if the railroad company failed to give the statutory signals required, that was sufficient to show negligence, without regard to whether such negligence was the proximate cause of the injury complained of. Exceptions 6 and 7 must, therefore, be sustained.

Exception 8 imputes error to the circuit judge in not holding that the magistrate erred in instructing the jury as to the law of contributory negligence, inasmuch as no such defense was pleaded by defendant. This was error, but **Harmless Error.** it is difficult to perceive how it could be harmful to the defendant. Indeed, the instruction complained of rather tended to benefit than injure the defendant, as it left the way open for the jury to give the defendant the benefit of a defense which had not been pleaded. The error, being harmless, affords no ground for granting a new trial on that ground. The judgment of this court is that for the reasons above indicated the judgment of the circuit court must be reversed, and the case remanded to that court, with instructions to that court to award a new trial in a magistrate's court.

## GARDNER

v.

## SOUTHERN RY. CO.

*(Supreme Court of North Carolina, Dec. 4, 1900.)*

[37 S. E. 328.]

**Exemption from Liability for Negligence—Validity of Stipulation.\*—**A common carrier cannot exempt itself from loss occasioned by its own negligence even by express stipulation.

\*See *Illinois Cent. R. Co. v. Bogard* (Miss.), 18 Am. & Eng. R. Cas., N. S., 410, and *foot-note*.

**Limiting Liability—Reduced Valuation.\***—A common carrier cannot stipulate that it shall be liable for an amount less than the value of property lost by its negligence, thereby exempting itself *pro tanto* from liability, the measure of damages being the amount of the loss.

**Fixing Value of Shipment—Validity of Agreement.†**—Though a common carrier can make a valid agreement fixing the value of shipments in case of loss by its negligence, such agreement must be reasonable.

**Same—Same—Necessity of Consideration.‡**—Though a common carrier can make a valid agreement fixing the value of shipments in case of loss by its negligence, such agreement must be based on a valuable consideration.

**Same—Same.**—Though a common carrier can make a valid agreement fixing the value of shipments in case of loss by its negligence, it must clearly appear that such was the intention of the parties.

**Same—Same—Burden of Proof.**—Where, in a suit against a carrier for the value of a shipment lost by its negligence, defendant sets up an agreement fixing the value of the articles lost, the burden is on it to show that the agreement was reasonable.

**Limiting Liability—Reduced Valuation Clause—Validity.**—In an action against a carrier for a shipment of goods lost by its negligence, defendant introduced a bill of lading containing a reduced valuation clause. No special consideration was shown for the clause, either through additional facilities or a lower rate of shipment. Plaintiff testified that the actual value was some five times the valuation fixed. *Held*, that the valuation clause was void, being unreasonable.

Appeal from superior court, Rowan county; Timberlake, Judge.

Action by J. W. Gardner against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

A. H. Price, for appellant.

R. Lee Wright and T. F. Kluttz, for appellee.

Douglas, J. This is an action for the value of a car load of stone destroyed through the negligence of the defendant. The following, taken from the case on appeal, includes all the evidence offered by either side: "It was admitted by defendant that it was negligent, and liable for the value of the stone lost and destroyed; but defendant contended that the value was the amount agreed on in the bill of lading. Plaintiff testified that two years ago defendant placed a car on a siding about four miles from Salisbury to enable him to load the same with stone for shipment to Danville, consigned to a purchaser there, whose name appears in the bill

Case Stated.

\*See Cincinnati, etc., Ry. Co's Receiver v. Graves (Ky.), 16 Am. & Eng. R. Cas., N. S., 177, and *foot-note*.

†See Pierce v. Southern Pac. Co. (Cal.), 7 Am. & Eng. R. Cas., N. S., 564, and extensive *note*, 573 *et seq.*

‡See *note*, 13 Am. & Eng. R. Cas., N. S., 188 *et seq.*

## Gardner v. Southern Ry. Co

of lading. After the car was loaded, it was moved by the company to another place, and afterwards got loose, and became a wreck, by reason of defective brakes. There was no depot at the siding, nor was there an agent at that point. Plaintiff obtained from the agent at Salisbury a blank bill of lading, and filled it up in his handwriting, and signed the same. He was instructed how to do this by the agent, and also instructed to value the load of stone at the rate of 20 cents a cubic foot, which, as plaintiff further testified, amounted to the sum of \$46.60. Plaintiff testified that the stone was worth \$218. This was a release shipment. Defendant objected to plaintiff's testifying that the stone was worth a greater sum than the amount specified in the contract or bill of lading. Objection was overruled, and there was an exception to this ruling by defendant. Defendant introduced the bill of lading, which was admitted to be in the handwriting of and signed by plaintiff." It is unnecessary to set out the bill of lading in full, as the greater part of it has no relation whatever to the question at issue, and apparently was never intended to have. It seems to be a general form used indiscriminately for all kinds of business, and merely filled in with a few names and figures to fit in some degree the particular shipment. That it is not a special contract for this particular car load of stone shipped from a siding near Salisbury to Danville is apparent from the following express stipulations. Among other things, the bill of lading, which is of considerable length, provides that: "As the packages aforesaid must pass through the custody of several carriers, it is understood, as a part of the consideration on which said packages are received, that the exemptions from liability made by such carriers respectively shall operate in the carriage by them respectively of said packages as though herein inserted at length, and especially that neither said carriers, nor either of them, shall be liable for leakage of any kind of liquids, nor for the losses by the bursting of casks or barrels of liquids arising from expansion and unavoidable causes, breakage of any kind of glass, carboys of acid, or articles packed in glass, stoves or stove furniture, castings, machinery, carriages, furniture, musical instruments of any kind, packages of eggs, or for loss or damage on hay, hemp, cotton, or the evaporation or leakage of alcohol, or leakage of oil of any description, or for damage to perishable property of any kind occasioned by delays of any kind or change of weather, or for the loss or damage on the sea or rivers. \* \* \* It is further understood and agreed between the parties hereto that the railway company above mentioned, or any connecting railroad company, shall not be liable for any damages by fire, or collisions on the rivers and sea, or for loss or damage by storm or accident on water, as the Southern Railway Company and connecting railroads assume no marine risks whatever." On its face appear the following words and figures: "Val. 20 cts. cubic foot." This is the only allusion it contains as to the value of the stone; nor is there the slightest intimation that

this valuation in any way affected the rate of freight, or was based upon any consideration inuring to the plaintiff. It is not even stipulated that this valuation shall be binding upon either party, unless it is found by implication in the following clause: "In consideration of the facilities afforded by this through bill of lading and the through rates of transportation agreed upon,— hereby consent to all of its provisions, and expressly agree to release the transportation companies and lines concerned in this bill of lading from any and all marine risks." It is somewhat difficult to see the direct application of this clause to the case at bar. The entire distance from the quarry to Danville is over the defendant's own line, and hence there is nothing in the nature of a through shipment, and certainly nothing that can properly be called marine risks. Nor does it appear that the plaintiff was afforded any unusual facilities. It is the duty of a common carrier to furnish all reasonable facilities, and the mere furnishing of such facilities affords no basis for any demand for additional compensation, or for the waiver of legal rights. The defendant admits that the loss occurred through its own negligence. It is a well-settled rule of law, practically of universal acceptance, that

**Exemption from  
Liability for  
Negligence—  
Validity of Stip-  
ulation.**

for reasons of public policy a common carrier is not permitted, even by express stipulation, to exempt itself from loss occasioned by its own negligence. *Mitchell v. Railroad Co.*, 124 N. C. 236, 32 S. E. 671; *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 322, 6 Sup. Ct. 750, 1176, 29 L. Ed. 873; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 415, 10 Sup. Ct. 365, 33 L. Ed. 730; *Constable v. Steamship Co.*, 154 U. S. 51, 62, 14 Sup. Ct. 1062, 38 L. Ed. 903. The measure of such liability is necessarily the amount of the loss; and if a common carrier is

**Limiting Liability—  
Reduced  
Valuation.**

permitted to stipulate that it shall be liable only for an amount greatly less than the value of the property so lost,—that is, for only a small part of the loss,—it is thereby exempted pro tanto from the results of its own negligence. Such a course, if permitted, would practically evade the decisions of the courts and nullify the settled policy of the law. We do not mean to say that there are no cases where a common carrier can make a valid agreement as

**Fixing Value of  
Shipment—Va-  
lidity of Agree-  
ment.**

to the value of the article shipped, but all such agreements must be reasonable, and based upon a valuable consideration.

**Same—Same—  
Necessity of  
Consideration.**

Moreover, it must clearly appear that such was the intention of the parties. This court has said in *Hinkle v. Railway Co.*, 126 N. C. 932, 938, 36 S. E. 348; "All such contracts of limitation, being in derogation of common law, are strictly construed, and never enforced unless shown to be reasonable.

**Same—Same.**

Any doubt or ambiguity therein is to be resolved in favor of

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the shipper; and it has been further held that the burden of proof rested upon the carrier of showing that all such stipulations and exemptions were reasonable,"—citing *Compania La Flecha v. Brauer*, 168 U. S. 104, 118, 18 Sup. Ct. 12, 42 L. Ed. 398; 4 Elliott, R. R. § 1424; and other cases. Again, we say in that case on page 939, 126 N. C., page 350, 36 S. E.: "Stipulations in a bill of lading are similar in their nature to conditions in a policy of insurance. It is well settled by the highest authority that if a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured, and against the construction which would limit the liability of the insurer. *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; *London Assurance v. Compania de Moagens de Barriero*, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113." The defendant relies entirely upon the case of *Hart v. Railroad Co.*, supra, but it does not apply to the facts before us. That case was expressly put upon the ground that the rate of freight charged was based upon the valuation. The court says, on page 336, 112 U. S. page 153, 5 Sup. Ct., and page 719, 28 L. Ed.: "The defendant receives the property for transportation on the terms and conditions expressed, which the plaintiff accepts 'as just and reasonable.' The first paragraph of the contract is that the plaintiff is to pay the rate of freight expressed 'on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each. \* \* \* If a chartered car, on the stock and contents in same, twelve hundred dollars for the car load.' \* \* \* If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation." The facts of that case were essentially different from those before us, and on such facts the court held that the stipulation was reasonable. In the case at bar it appears to us that the stipulation, if it amounted to such, was unreasonable, and without consideration. In this view we are sustained by the latest case we can find upon the subject,—that of *Ward v. Railway Co.* (Mo. Sup.) 58 S. W. 28, in which the supreme court of Missouri says on page 31: "There was no consideration for the 'reduced valuation clause' in the contract of shipment, and to that extent it was void and inoperative, and should not have been considered by the jury." In the case at bar the defendant asked the court to instruct the jury "that the quantum of damages was the sum agreed on in the bill of lading, and that was admitted by plaintiff to be in the sum of \$46.60." The court refused to give this instruction, and instructed the jury

Same—Same—  
Burden of Proof.Limiting Liability—Reduced  
Valuation Clause  
—Validity.

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"to find from the evidence what the real value of the stone was; that the law presumes it to be only 20 cents per cubic foot, and the plaintiff must satisfy them by the greater weight of evidence that it was more than the amount mentioned in the bill of lading; unless he had done so, to render their verdict for that amount, but, if so satisfied, to render a verdict for whatever sum they find from the evidence it was worth." In this charge and refusal to charge we see no error. The judgment of the court below is affirmed.

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HEBERT

v.

LOUISIANA W. R. R.

(*Supreme Court of Louisiana, Jan. 7, 1900.*)

[29 South. 239.]

**Right to Presume That Person Seen on Track Will Avoid Train.**—The engineer of a train running on schedule time, on its own right of way, in the open prairie, away from any town or crossing, is not called upon to immediately slacken its speed from the simple fact that a trespasser sitting upon the ties does not at once rise and change his position on receiving warning of the approach of the train by the ringing of the bell and the blowing of the whistle, duly and properly given.

**Same.\***—The engineer has the right to assume that he will ultimately obey the signals, and is not held to presume, in the absence of some special circumstance, that the inaction of the trespasser is due to some physical cause or infirmity which prevents his leaving the ties.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Calcasieu; E. D. Miller, Judge.

Action by Marie Hebert against the Louisiana Western Railroad. Judgment for defendant, and plaintiff appeals. Affirmed.

Paul A. Sompayrac, for appellant.

Denegre, Blair & Denerge and Pujo & Moss, for appellee.

Statement of the Case.

Nicholls, C. J. The plaintiff, widow of Vilier Hebert, seeks judgment for \$10,000 against the defendant company for damages caused her by the killing of her husband, alleged to have been caused by the fault of the said company. She alleges

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\*See *Piskorowski v. Detroit, etc., Ry. Co.* (Mich.), 19 Am. & Eng. R. Cas., N. S., 120, and *note*, 123 *et seq.*

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that on February 10, 1900, her said husband was sitting on the track or right of way of said above named company, at or near the town of Welsh, in Calcasieu parish, La., with his head down, apparently under an influence that deprived him of the exercise of his senses and strength; that the engineer in charge of and running passenger train No. 9, west bound, operated by said company, had notice of the condition and position of the deceased on that occasion, when said train was fully 600 yards from him, and that he could easily have stopped said train, and obviated killing her husband, but that he carelessly, and in utter disregard of the preciousness of human life, ran said train onward, struck her husband with same, fracturing his skull, from the effects of which he died within a very short time; that her husband was guilty of no contributory negligence, and that his death was caused by the fault of the employees of said company, their negligence, and want of skill. Defendant, after pleading the general issue, admitted that plaintiff's husband came to his death by accident on February 10, 1900, while seated on defendant's track, but denies that said accident was due to fault or negligence on the part of the defendant, or any of its officers, agents, or employees, and avers that said accident was contributed to, and caused by, the deceased's own gross negligence in voluntarily and unnecessarily placing himself in a position of obvious danger on defendant's track, and in failing while there to exercise proper or any care or caution to avoid being run over by a passing train. Judgment was rendered in favor of defendant. Plaintiff appealed.

## Opinion.

This suit is brought by Marie Hebert, as widow of Vilier Hebert, claiming damages from the defendant company for the death of her husband. It is claimed that the husband was killed by being struck on the head by some part of a train which was being operated by defendant's employees, and that the injury was received as the result of gross fault and negligence on the part of those employees. The evidence shows that the deceased, Vilier Hebert, lived about 2½ miles west of the village of Welsh, in the parish of Calcasieu; his residence being about a quarter of a mile to the south of defendant's tracks. He had lived in this same place for many years, and must therefore have been familiar with the whole local situation. The testimony shows that he made a practice of going to Welsh every Saturday morning, and returning home in the afternoon; that he made the trip along the defendant company's track, both ways, by walking along the track. On February 10, 1900, he made his customary Saturday visit, and started homeward in the afternoon. When he had reached a position on defendant's right of way almost opposite his own house he sat down on the outer edge of the ties, or between the ends of the ties, which cross the track. He had been seated at this place about half an hour, when defendant's regular

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west-bound passenger train approached him from the direction of Welsh, running at a speed of 40 or 45 miles an hour, struck him on the head as it passed, and killed him instantly. He had been seen sitting upon the ties by the engineer and fireman some time before they reached him, and he was warned of the approach of the train by the ringing of its bell and the blowing of its whistle, but he remained seated, paying no attention to the signals given, further than to turn his head partly towards the locomotive bearing down upon him. The plaintiff's counsel concedes that, in order to sustain his action, he must bring it within the exceptional class of cases where a plaintiff, in spite of being guilty of contributory negligence, is entitled to recover damages for injuries received by him, and this he has undertaken to do. He contends that the attempt to stop the train by the application of the brakes was made when it was useless to have made the attempt, as it was obvious that the train could not then be stopped before reaching Hebert; that the attempt to hold up the train at that late time might well have been omitted altogether, so far as any practical good to result therefrom was concerned. His contention is that the train was passing through an open prairie country, on a straight line, with an unobstructed view ahead for over a mile; that Hebert was, in point of fact, seen sitting on the track for a half a mile before he was reached; that it was the fireman's duty to have immediately rung the bell, and the engineer's duty to have at once blown his whistle, so as to apprise Hebert of his danger; that having done so, and seeing that no notice was being taken of the signals, it was the duty of the engineer to have commenced applying his brakes at a point sufficiently removed from the deceased to have admitted of the stopping of the train, and not to have delayed doing so until the attempt to stop would manifestly prove ineffectual. He claims that the brakes should have been applied earlier than they were, and that, had this been done, the life of the deceased would not have been sacrificed. He further contends that the evidence shows that the deceased was observed by the trainmen on the ties "with his head down," and his position was such as to have at once notified defendant's employees that he was suffering from some physical trouble, and taken precautions accordingly.

The precise distance from Hebert at which the train bell began ringing, and the train whistle commenced blowing, is not definitely fixed; but we think it is shown that when the brakes were first applied it was too late, so far as the complete stopping of the train was concerned, to have avoided the accident. The trainmen say they saw nothing sufficiently peculiar in Hebert's position at the end of the ties to have aroused their suspicions as to his being there under extraordinary conditions; that it is a matter of constant occurrence for men to sit down at the end of the railroad ties, and remain sitting, though

Right to Presume  
That Person Seen  
on Track Will  
Avoid Train.



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they hear the signals, until just before the train reaches them, when they will rise, and "make motions at the engineer"; by which we understand them to say that this continued sitting on the ties by these trespassers is often purposely done, merely to exasperate the engineer, or because considered as a joke, in seeking to make him hold up his train uselessly. The train was being operated at the point it was at a legal rate of speed, on schedule time. The engineer was not called upon to

slacken its speed upon the bare possibility that, unless this should be done, an injury might result by reason of the unknown physical condition of a trespasser. The evidence shows that in point of fact Hebert heard either the ringing of the bell or the blowing of the whistle before the engine reached him, for he turned his head in that direction, though he did not attempt to rise. We think he had ample time to have escaped, unless from sickness or some physical trouble, not explained, he was unable to rise at all. Plaintiff suggests that the day was bitterly cold, and Hebert had succumbed to the freezing weather; but this is pure conjecture. The evidence does not disclose that he had been sick, or that he was sick when the train reached him. Why he did not push himself off from the end of the tie, even if he did not rise to his feet, or why he did not rise to his feet, is not explained.

Although it was too late when the brakes were applied to have stopped the train before Hebert was reached, yet the ringing of the bell, the blowing of the whistle, and the slackening of the speed of the train gave Hebert timely opportunity to have saved himself by his own efforts. After consideration of the evidence adduced in this case, we are of the opinion that the judgment appealed from is correct, and it is hereby affirmed.

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## STORY

v.

CONCORD & M. R. R. *et al.*

(*Supreme Court of New Hampshire, July 27, 1900.*)

[48 Atl. 288.]

**Injury to Employee—Defect in Track of Another Company—Separate Trials—Discretion of Court.**—Where a servant of one railroad company was injured while running his employer's train over a track belonging to another railroad company, and brought suit against both companies, it rested in the discretion of the trial judge to decide whether justice and convenience demanded separate trials.

**Same—Same—Liability of Master.\***—Where a fireman on a locomotive was injured by reason of a defective track over which he was running

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\*See notes at end of case.

## Story v. Concord &amp; M. R. R

his engine in the course of his employment, the fact that the track was owned by another company, whose duty it was to keep it repaired, and that the fireman knew such fact, or that he had an action against such company, did not deprive him of his right of action against his employer, since such fact did not relieve his employer from the duty of furnishing a safe place to work.

**Same—Same—Assumption of Risk.\***—A locomotive fireman did not assume the risk of defects in the railroad track over which he was running his train in course of his employment merely because he knew that a company other than his employers owned the track, and owed the duty of keeping it in repair.

**Trial—Remarks of Counsel.**—Where the evidence as to the cause of plaintiff's injuries was in direct conflict, a remark by his counsel was permissible which was to the effect that the testimony of every witness who was employed by defendant, except that of one, was utterly false, since plaintiff had a right to claim that the false testimony was his opponents.

**Same—Same.**—In an action by a locomotive fireman against his employer for injuries received by reason of an alleged defect in the track the defense was that the engineer caused the injury by negligently running the train at a rate of speed almost certain to cause derailment. The engineer was retained in employment by the company, but was not called as a witness; and a physician called by defendant testified that he was ill, but that his deposition could be taken. Plaintiff, in the hearing of the jury, offered to take his deposition; and defendant refused, saying that plaintiff might do so if he wished. Plaintiff's counsel, in remarks to the jury, said that: "A corporation that would keep a man in its employ who would recklessly hurl his train to danger ought to be indicted. What! Keep a man who had been so reckless! Keep him in their employ! Keep him to the present moment! Keep him in bed when he should have been here and testified." *Held*, that, though there was no evidence that defendant caused the engineer to feign illness, but, on the contrary, that either party might have secured his deposition, plaintiff's remarks were not such a departure from legitimate advocacy as to constitute reversible error. *BLODGETT and PARSONS, JJ.*, dissenting.

**Same—Same—Waiver of Objection.**—Where an objection to the remarks of counsel was stated to the stenographer, but not made known to the court until the conclusion of the argument, no exception could be claimed thereon, since an objection is not taken until made known to the court, and is waived if not taken when the alleged error occurs, so that it may be corrected.

Exceptions from Hillsboro county.

Action by William A. Story against the Concord & Montreal Railroad and the Boston & Maine Railroad. From a judgment in plaintiff's favor against the Concord & Montreal Railroad, it excepts. Exceptions overruled.

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\*See notes at end of case.

## Story v. Concord &amp; M. R. R

Case to recover for injuries received August 26, 1894, in the railroad yard at Portsmouth, by the derailment of an engine of the Concord & Montreal Railroad on which the plaintiff was fireman. The plaintiff was the servant of the Concord & Montreal Railroad. It was alleged that the derailment was due to the defective condition of the track, which was owned and repaired by the Boston & Maine Railroad. The suit was brought against both corporations. At the opening of the trial the defendants moved for separate trials, and that the plaintiff be required to elect against which defendant he would then proceed. The motion was denied, subject to exception. The defendants' motion for a nonsuit was also denied, subject to exception. At the close of the evidence a verdict was ordered for the Boston & Maine Railroad. Subject to exception, the court refused to direct a verdict in favor of the other defendants, the Concord & Montreal Railroad. The facts and other exceptions taken are stated in the opinion.

Burnham, Brown & Warren and Samuel W. Emery, for plaintiff.

Oliver E. Branch, William H. Sawyer, and Frank S. Streeter, for defendants.

Parsons, J. Whether justice and convenience required separate trials was a question of fact determined by the ruling of the presiding justice. *Eames v. Stevens*, 26 N. H. 117, 121.

The Boston & Maine Railroad having been discharged by a verdict in their favor, to the direction of which by the court no exception appears to have been taken, the only question is whether, upon the facts stated, the verdict found by the jury against the Concord & Montreal Railroad should stand. As the case is presented to us, the Concord & Montreal Railroad are the sole defendants.

It appears that the plaintiff, a locomotive fireman in the employ of the defendants, was injured while in the course of his duty because of a defect in the track, as he alleges, over which, by direction of his employers, the locomotive upon which he worked was passing. The track claimed to be defective was not a part of the defendants' railroad, but was owned and kept in repair by another railroad corporation, which had exclusive control over it. The plaintiff knew these facts. The use of this track by the defendants was rightful, but the precise terms upon which they enjoyed such use did not appear. At the trial the defendants' motion that a verdict be ordered for them was denied. The first question considered under the defendants' exception to the denial of this motion is whether the fact that the alleged defective track was neither owned, managed, nor kept in repair by the defendants, to the plaintiff's knowledge, relieves them of liability for nonperformance of the master's duty to

**Injury to Employee—Defect in Track of Another Company—Separate Trials—Discretion of Court.**

**Case Stated.**

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provide suitable and safe appliances for the use of the servants in his employment. "This duty may be, and, in case the employer is a corporation, must always be, discharged by agents and servants; and the agent or servant charged with its performance, whatever his rank of service may be, stands in the place of the employer, who thereby becomes responsible for his acts, and chargeable with the negligence of such agent or servant." *Jaques v. Manufacturing Co.*, 66 N. H. 482, 484, 22 Atl. 552, 13 L. R. A. 824; *Pierce*, R. R. 369. As the employer is not discharged by delegating this duty to a servant or a number of servants, the delegation of the duty to a corporation, as servant or agent, would not relieve him. What the contract for the use of the Boston & Maine track by the defendants was, is immaterial. Neither road, by agreement with the other, could relieve the other of any liability as to third persons which the law imposes. Under whatever names they were styled in their agreement, if there was one, the undisputed fact of the rightful use by the defendants of a portion of the Boston & Maine tracks, cared for and repaired by the Boston & Maine, established that the Boston & Maine were the agency employed by the defendants in the performance of their duty of furnishing a safe and suitable track for their employees. Having, either by express agreement or by permissive use of the Boston & Maine track, employed that corporation as their agent in the performance of their master's duty, the defendants thereby become responsible for the acts and chargeable with the negligence of such agent; and, as the corporation thus made the defendants' agent and servant could act only through their agents and servants, the defendants became responsible for the acts and chargeable with the negligence of the individual employees of that corporation, who were personally charged with the duty of inspection and repair owed by the defendants to their servants. *Murch v. Railroad Corp.*, 29 N. H. 9, was an action by a passenger of the Northern Railroad to recover for injuries alleged to have resulted to him from a defect in the track of the Concord Railroad, of which, at the point and time of the alleged injury, the Northern Railroad was in permissive use. In the decision of the questions thereby arising this court said (page 35): "By using the railroad of another corporation as a part of their track, whether by contract or mere permission, they [the Northern] would ordinarily, for many purposes, make it their own, and would assume towards those whom they had agreed to receive as passengers all the duties resulting from that relation as to the road; and if accident resulted to such passengers from any failure of duty of the owners of the road, for which they would be responsible if the road was their own, their remedy over would be against the owners." In that case the plaintiff's claim against the Northern Railroad arose from his contract of carriage. In the present, the plaintiff relies upon the obligations implied in his contract of employment. *Fifield v. Rail-*

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road Co., 42 N. H. 255. Though the requirements of the contract in the case of a passenger and an employee differ in degree, the principle upon which the claim of each is founded is the same,—the failure of the other party to the contract to exercise such care as is demanded by the relation mutually assumed. As stated by Knowlton, J., in *Engle v. Railroad Co.*, 160 Mass. 260, 263, 35 N. E. 547, 22 L. R. A. 283: "The duty of a railroad corporation to furnish for its employees safe tracks, cars, locomotive engines, and other machinery, tools, and appliances with which its business is to be carried on, is similar in kind to its duty to passengers in these respects, although the degree of care required is less. In either case its duty is the same when the tracks \* \* \* are hired or used under a license from others as when they are owned by the employer." *Spaulding v. Granite Co.*, 159 Mass. 587, 34 N. E. 1134; *Railroad Co. v. Ross*, 142 Ill. 9, 31 N. E. 412; *Stetler v. Railway Co.*, 46 Wis. 497, 1 N. W. 112; *Id.*, 49 Wis. 609, 6 N. W. 303; *Railway Co. v. Cagle*, 53 Ark. 347, 14 S. W. 89; *Smith v. Railroad Co. (C. C.)* 18 Fed. 304.

It is suggested that, since the defendants' trains were rightfully using the Boston & Maine tracks, that corporation owed to the defendants and their servants the duty of maintaining the track in a reasonably safe and suitable condition for use,—a duty arising, not out of contract, nor from the relation of master and servant, but which the law imposed upon the grounds of public safety. It may be assumed that this claim correctly states the law. *Pierce, R. R.* 274; *Sawyer v. Railroad Co.*, 27 Vt. 370; *In re Merrill*, 54 Vt. 200; *Snow v. Railroad Co.*, 8 Allen, 441; *Robertson v. Railroad Co.*, 160 Mass. 191, 35 N. E. 775; *Nugent v. Railroad Co.*, 80 Me. 62, 12 Atl. 797. But the liability of the owner of the track, if established, does not relieve the defendants of their master's duty. "In many instances several parties may be liable in law to the person injured, while as between themselves some of them are not wrongdoers at all." *Nashua Iron & Steel Co. v. Worcester & N. Railroad Co.*, 62 N. H. 159, 160. As the case now stands, there is no question of joint liability. The Concord & Montreal are the sole defendants. That parties are not jointly liable for an injury, because not jointly negligent, does not establish that they are not severally liable. *Mulchey v. Society*, 125 Mass. 487; *Parsons v. Winchell*, 5 Cush. 592; *Shear. & R. Neg.* §§ 244, 248; *Busw. Pers. Inj.* § 31. That the parties are not joint tortfeasors, so as to be jointly liable in trespass, does not establish that each may not be a wrongdoer as to the party injured. One who is liable for an injury may recover of another wrongdoer the sums he has been compelled to pay by the latter's negligence, if, as to the latter, he is without fault. *Nashua Iron & Steel Co. v. Worcester & N. Railroad Co.*, *supra*; *Railroad Co. v. Slavens*, 148 Mass. 363, 19 N. E. 372. Whether, under the circumstances, there

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would be a right of recovery of one corporation from the other, it is not necessary to inquire. It is sufficient that such right, if existent, does not affect the plaintiff. The defendants' breach of duty for which the plaintiff seeks to recover is severable and distinct from the breach of duty for which it is suggested the Boston & Maine might be liable to the plaintiff. The wrong of one does not excuse or justify the wrong of the other.

It is also suggested that the plaintiff assumed the risk of running over a track owned by another railroad, and which he saw was repaired by the employees of that corporation, and not by the employees of the defendants. That ~~Same-Same-  
Assumption of  
Risk.~~ the servant assumes the risks ordinarily incident to his service, and also the special hazards arising from the master's peculiar methods, which the servant knows and of which due care would inform him, is settled. But there was no evidence tending to show that the plaintiff knew or ought to have known the track was defective, or that the owners' employees were negligent in their care of it. He did not know, and it does not appear conclusively, as matter of law, that he ought to have known, that the defendants furnished him an unsafe track. Therefore he did not assume the risk of such a track. The extent of his knowledge was that the defendants provided a track through some arrangement made with the owners of the track. His knowledge that the Boston & Maine employees repaired the track, and that the defendants did not, was not an assumption of the risk of negligence of the persons doing that work. In *Jaques v. Manufacturing Co.*, supra, the plaintiff knew that the loom fixer, Burke, was employed to repair her loom. Her knowledge of Burke's employment was not an assumption of the risk of his negligence. Mere knowledge by the servant of the persons or agencies employed by the master to perform the master's personal duty towards him is not an assumption of the risk of negligence by such particular persons or agencies. If it were, the master's personal liability would be at an end. As it is not claimed that Boston & Maine tracks generally were so unsafe, and their employees so habitually negligent in the repair of them, as to present a special danger in running upon the tracks of that corporation, or that there was some peculiar hazard in running a Concord & Montreal engine on a Boston & Maine track, of which danger or hazard the plaintiff knew or ought to have known, he is not chargeable with the assumption of the risk of the track by his knowledge that the track was owned and controlled by the Boston & Maine. Whether he understood, or whether, in fact, the Concord & Montreal, by employees of their own, inspected the track, or whether the defendants relied upon the inspection made by employees of the Boston & Maine, is immaterial. The Concord & Montreal could make such inspection only through agents or servants. Whether it employed inspectors

directly or through the agency of the Boston & Maine, whether the actual inspectors were carried on the defendants' pay roll, or whether the defendants paid for their services in the adjustment made for the use of the track in accordance with or in the absence of prior contract, or whether nothing was paid for the use of the track, the actual inspectors, whether directly in the employ of the one corporation or the other, were the agents adopted by the defendants for the performance of their master's duty, and for their negligence the defendants are responsible. *Railway Co. v. Peyton*, 106 Ill. 534, 540.

The remaining ground urged in the support of the defendants' exceptions to the denial of their motions for a nonsuit and a verdict does not call for extensive consideration. It cannot be said, as matter of law, that the testimony of the plaintiff and the four witnesses called by him as to the condition of the track and rotten ties disclosed at the derailment is untrue. Nor, conceding the truth of this testimony, can it be said that reasonable men might not infer therefrom that the defective track caused the accident, and that the defective conditions existing could have been discovered by reasonable care in inspection before the injury. Therefore the motion for a nonsuit was properly denied. The defendants' evidence did not alter the situation. It did not furnish an uncontradicted answer to the plaintiff's case, assuming the plaintiff's evidence to be true, but answered the plaintiff's case by contradicting it. The defendants' case was that there were no rotten ties, that the track was in good condition, and that the accident was due solely to the negligence of the engineer in running at excessive speed upon the cross-over. Which party was entitled to the verdict depended upon the weight of the evidence. Upon this question our impressions are not material. The weight of evidence is for the jury, and not for the court. *Abbott v. Railroad*, 69 N. H. 176, 44 Atl. 912. The evidence of the railroad employees that they inspected the track and discovered no defect was merely an answer to the testimony of the plaintiff's witnesses of the facts as they found them, and to the inference which might be drawn from the condition described by them,—that there was no efficient inspection, because the defect was not discovered and remedied before the accident. It was for the jury to say which contention was true. As the case contains substantial evidence of some weight in support of the plaintiff's contentions, it was properly submitted to the jury. The exceptions to the denial of the motions for a nonsuit and a verdict are overruled.

The remaining exceptions relate to the argument of counsel. The limit of the privilege of counsel in legitimate advocacy in behalf of his client has been thoroughly considered by the court in numerous cases of comparatively recent date. The present case does not raise any new question, but, in view of the repeated presentation of the question, it is thought that a brief reference to the application of these principles which has been made may be of use.

The following statements were held improper, and verdicts obtained by the counsel making them were set aside, except where a finding was obtained from the trial court that the error had been cured by withdrawal of the objectionable remarks, and that the verdict was not influenced thereby: In *Greenfield v. Kennett*, 69 N. H. 419, 45 Atl. 233, counsel for the plaintiff said he "should be willing to try this case before a jury composed of parties with whom the defendant had dealt." *Perkins v. Burley*, 64 N. H. 524, 15 Atl. 21, presented a similar remark. Counsel said in argument to the jury that, if they knew how the plaintiff and his brother are regarded in the vicinity in which they live, he would be willing to submit the case without argument. In *Perkins v. Roberge*, 69 N. H. 171, 39 Atl. 583, counsel said in argument: "This is a pretty serious matter, when a man testifies to what is not true in a matter of as great importance as this; and I don't want him or his counsel, either, to say that he did not understand the question." This remark was considered reprehensible, but to afford no ground for setting aside the verdict which had been found in a trial by the court without a jury. In *Shute v. Manufacturing Co.*, 69 N. H. 210, 40 Atl. 391, the closing argument of the plaintiff's counsel, that the defendants "were so anxious for production that they took down remnants of the pulley while the girl lay bleeding upon the floor," contained no statement of fact which the evidence did not tend to prove and was legitimate. In *Pritchard v. Austin*, 69 N. H. 367, 46 Atl. 188, the objectionable remark of counsel having been withdrawn, and an affirmative finding made by the presiding justice that the jury were not influenced thereby, the exception taken to the remark made was overruled. In *Town of Monroe v. Connecticut River Lumber Co.*, 68 N. H. 89, 39 Atl. 1019, counsel stated to the jury that the statements made by a witness in a deposition which was in evidence were true, and his testimony on the stand false. It was said: "Nobody can reasonably doubt the legitimacy of such an argument." As to another objection claimed in the same case, it was said: "There is no finding \* \* \* that the alleged improper argument \* \* \* was in fact made, nor is any exception allowed on this subject. Consequently there is nothing which can now be considered." In *Heald v. Railroad Co.*, 68 N. H. 49, 44 Atl. 77, counsel said, in effect, that the defendants had tolerated a dangerous practice of lowering gates at the crossing "for all this time,"—meaning apparently for a long time, when there was evidence of such practice at the time of the accident only. In *Robertson v. Town of Madison*, 67 N. H. 205, 29 Atl. 777, counsel stated in argument that the testimony of a witness was different from what it was upon a former trial. There was no evidence as to his testimony upon a previous trial. In *Jordon v. Wallace*, 67 N. H. 175, 32 Atl. 174, the defendant's counsel said of the plaintiff: "I don't believe that he ever lived an honest hour



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in his life, when he was not either plotting and planning to beat somebody individually, or to go into bankruptcy and beat everybody collectively." In *Noble v. City of Portsmouth*, 67 N. H. 183, 30 Atl. 419, counsel said: "When people get \$1,200 or \$1,500 for a fracture, is \$3,000 too much in this case?" In *Bullard v. Railroad Co.*, 64 N. H. 27, 5 Atl. 838, the defendants' counsel commented on the fact that one of the plaintiff's physicians had been called to testify. The plaintiff's counsel said in reply that the physician had not been called because he had not examined the plaintiff. In *Cross v. Grant*, 62 N. H. 675, counsel stated that there were facts to which one of the plaintiff's witnesses did not testify because the witness' knowledge of them was not known to the plaintiff until after she had closed her case. He also stated what a certain witness would have testified if recalled, and attempted to repeat and comment upon evidence that had been excluded. In *Hilliard v. Beattie*, 59 N. H. 462, counsel commented in his opening on the fact that there had been a change of venue, and further referred to the subject in argument. In *Tucker v. Henniker*, 41 N. H. 317, counsel referred to a case by name which had been tried before referees, and stated the amount of damages awarded. In *State v. Foley*, 45 N. H. 466, the verdict was set aside because counsel were permitted to argue a matter upon which there was no competent evidence. In *Pearson v. Beef Co.*, 69 N. H. 584, 44 Atl. 113, *Baldwin v. Railway Co.*, 64 N. H. 596, 15 Atl. 411, and *Demars v. Manufacturing Co.*, 67 N. H. 404, 40 Atl. 902, the fact that the incompetent statements were in the form of questions to witnesses, which the witnesses were not permitted to answer, did not alter the rule, though in the latter case a finding that the verdict was not affected thereby, sufficed to prevent a new trial. In *Dow v. Electric Co.*, 68 N. H. 59, 31 Atl. 22, the remarks objected to related to the law of the case, and not to the facts, and were not prejudicial. In *Dow v. Weare*, 68 N. H. 345, 44 Atl. 489, the remarks objected to were supported by the evidence. In *Furnald v. Burbank*, 67 N. H. 595, 30 Atl. 409, there was a finding that the remarks were not prejudicial. The report of the case does not show what was said. In *Aldrich v. Railroad*, 67 N. H. 380, 36 Atl. 252, the appeal of counsel to the jury not to be niggardly in the assessment of damages, because they might sometimes appreciate niggardliness through personal experience, was not so inconsistent with legal fairness of trial as to require, as matter of law, that there should be a new trial. This was merely an appeal for a fair judgment. It is manifest a niggardly assessment would not be the fair assessment of damages to which the plaintiff was entitled. In *Sabine v. Merrill*, 67 N. H. 226, 38 Atl. 733, counsel commented upon a paper not in evidence. The verdict against the claim made established that the remarks of counsel did not produce the effect intended, and the opposite party was not prejudiced thereby. In *Gault v. Railroad Co.*, 63 N. H. 356, the allusion

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of counsel to the importance of the case to his client was said to be dangerous, and apt to be carried to an extent inconsistent with legal fairness of trial. In *Felch v. Town of Weare*, 66 N. H. 582, 27 Atl. 226, counsel said, "I cannot comment on evidence that has been excluded." The remark was said to belong to a dangerous class, but that, as the jury did not know to what it referred, it might be inferred that the remark had no influence favorable to the party making it. In *Harrington v. Wadsworth*, 63 N. H. 400, permitting counsel to draw unwarranted inferences was said to be equivalent to a ruling that the inference may legally be drawn, and erroneous. In *Mitchell v. Railroad Co.*, 68 N. H. 96, 117, 34 Atl. 674, the question of fact being whether the engineer rang the bell upon the locomotive before starting, the plaintiff's counsel said that "out of the whole population of Woodsville" the defendants were able to produce but two witnesses to testify that the bell was rung. This was not objectionable. "It was merely a forcible expression of the presumption that the defendants called on the point all the witnesses they could procure, and of the conceded fact that of the nine or ten persons shown to be within hearing, and of others whom the jury might find on the evidence were within hearing, two only were produced to testify that they heard the bell. \* \* \* A verdict is not to be set aside for the reason that counsel urged the jury to draw from admitted or established facts an unwarranted inference. Such an argument is merely an erroneous statement of the law. Whether the inference can properly be drawn is a question of law. Whether, if it lawfully may, it shall be drawn, is for the jury. \* \* \* It is the duty of the court to instruct the jury upon the law, and of the jury to obey the instructions. In the absence of evidence to the contrary, it is presumed that these duties were performed. If in *Bullard v. Railroad Co.*, 64 N. H. 27, 5 Atl. 837, the plaintiff's counsel, instead of stating to the jury as a fact that the physician had not examined the plaintiff, and therefore was not called as a witness, had asked the jury to infer, from the fact that he was not called, that he had not examined the plaintiff, and therefore could not testify to his condition, he would not have transgressed the line of his duty." It is the right of counsel in the closing argument to comment upon the evidence received on the trial; to criticise the character, conduct, appearance, motives, and testimony of the witnesses, so far as they have appeared and are relevant to the issue. *Hilliard v. Beattie*, 59 N. H. 462, 465. "The range of discussion is wide." Within that range, the only limitation is the ability of counsel. "His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit or wings to his imagination." *Tucker v. Henniker*, 41 N. H. 317, 323. But the limit in discussion is "the facts in the case, and the conclusions legitimately deducible from

the law applicable to them." *Jordon v. Wallace*, 67 N. H. 175, 178, 32 Atl. 174. If counsel errs in his view of the law applicable to the facts, and urges the drawing of unwarranted inferences therefrom, so long as he makes no statement of fact outside the evidence a verdict in his favor will not be disturbed, unless the court expressly or tacitly confirms his erroneous view of the law. *Mitchell v. Railroad Co.*, 68 N. H. 96, 117, 34 Atl. 674; *Harrington v. Wadsworth*, 63 N. H. 400. But the statement to the jury by counsel of facts which are incompetent as evidence is error, whenever during the trial the statement is made. It is error whether made in the opening or in the argument, or in the interrogation of witnesses, or in the course of altercations between counsel. The statement in argument of material matters which are not in proof, or an attack upon the opposite party based upon other than the facts in the case and the conclusions legitimately deducible from the law applicable thereto, are equally erroneous. If it does not appear that the verdict cannot have been influenced thereby (*Sabine v. Merrill*, 67 N. H. 226, 38 Atl. 733), such error is fatal, unless upon objection the party in fault immediately withdraws the objectionable statement, asks the jury not to consider it, obtains an instruction to the jury from the court to that effect, and a finding from the presiding justice that the error was cured and did not affect the result. *Pearson v. Beef Co.*, 69 N. H. 584, 44 Atl. 113; *Perkins v. Roberge*, 69 N. H. 171, 39 Atl. 583; *Shute v. Manufacturing Co.*, 69 N. H. 210, 40 Atl. 391; *Greenfield v. Kennett*, 69 N. H. 419, 45 Atl. 233; *Heald v. Railroad Co.*, 68 N. H. 49, 44 Atl. 77; *Dow v. Electric Co.*, 68 N. H. 59, 31 Atl. 22; *Town of Monroe v. Connecticut River Lumber Co.*, 68 N. H. 89, 39 Atl. 1019; *Mitchell v. Railroad Co.*, 68 N. H. 96, 34 Atl. 674; *Dow v. Weare*, 68 N. H. 345, 44 Atl. 489; *Jordon v. Wallace*, 67 N. H. 175, 32 Atl. 174; *Noble v. City of Portsmouth*, 67 N. H. 183, 30 Atl. 419; *Sabine v. Merrill*, 67 N. H. 226, 38 Atl. 733; *Aldrich v. Railroad Co.*, 67 N. H. 380, 36 Atl. 252; *Demars v. Manufacturing Co.*, 67 N. H. 404, 40 Atl. 902; *Felch v. Town of Weare*, 66 N. H. 582, 27 Atl. 226; *Bullard v. Railroad Co.*, 64 N. H. 27, 5 Atl. 838; *Perkins v. Burley*, 64 N. H. 524, 15 Atl. 21; *Baldwin v. Railway Co.*, 64 N. H. 597, 15 Atl. 411; *Harrington v. Wadsworth*, 63 N. H. 400; *Gault v. Railroad Co.*, 63 N. H. 356; *Cross v. Grant*, 62 N. H. 675; *Hilliard v. Beattie*, 59 N. H. 462; *State v. Foley*, 45 N. H. 466; *Tucker v. Henniker*, 41 N. H. 317.

The argument of the plaintiff's counsel to which objection was first taken was within the limits of legitimate advocacy. Counsel said: "There is not a witness except one who has

**Trial—Remarks  
of Counsel.**

testified here, and who is in the employ of the railroad, whose testimony is not utterly false."

The witnesses on the two sides of the controversy were in conflict. One inference by which such conflict is explainable is that the witnesses on one side or the other have

been untruthful. Counsel have the right to claim that the false testimony came from his opponents. *Town of Monroe v. Connecticut River Lumber Co.*, 68 N. H. 89, 92, 39 Atl. 1019. This was the substance of the statement: The plaintiff's counsel also said: "Actions tell you, Mr. Foreman,

something. I cannot conceive, I do not believe you or any man on that panel can conceive, of such a story as they bring in here to rob my client of his rights. I don't believe that any one of you can conceive of the Concord & Montreal Railroad keeping a man in their employ who would hurl his train in that way into danger, and imperil the property of the road and the lives of its passengers. I tell you that a corporation that would do that ought to be indicted, and the man who had charge of this engineer, and kept him day after day in the employment of this company, endangering your lives and mine, ought to have been punished. Hadn't he? What! Keep a man who had been so reckless, and who had done this awful thing they tell you about! keep him in their employ! keep him day after day! keep him until the present moment! keep him in his bed, when he should have been here and testified!" To this remark exception was duly taken. What is now said tending to sustain the exception is the view of the Chief Justice and myself. In this view a majority of the court do not concur. As before stated, the defendants' case before the jury was founded upon the proposition that the accident was not caused by any defect in the track, but by the negligence of the engineer in running upon the cross-over, contrary to the rules of his employers, at a high speed,—at a speed almost certain to produce derailment. It appeared that the engineer was retained in the defendants' employ, despite the fact of his guilt of criminal recklessness and disobedience of orders, if the claim made at the trial was true. We see nothing objectionable in the comments of counsel upon these facts, as bearing upon the probability whether the claim now made as to the cause of the accident was correct. The facts were legitimately in the case, and counsel had the right to make use of them. Counsel did not say the engineer or the defendants had been guilty of an indictable offense, or claim that they had been if such claim would have been objectionable. His argument was that they had not been guilty of such recklessness or want of care. The defendants introduced the testimony of a physician to the effect that the engineer was ill at his residence in Manchester, and unable to attend court. Upon cross-examination the physician testified that the engineer was able to give a deposition. The plaintiff's counsel then, in the hearing of the jury, offered to go and take the deposition. The defendants' counsel declined, saying that they did not care to take it, but that the plaintiff's counsel could do so if they chose. Comment upon the fact that the engineer's testimony was not produced was also legitimate. What inference should be drawn from the fact

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was for the jury. *Carter v. Beals*, 44 N. H. 408, 413. But counsel went further, and informed the jury that the defendants kept the engineer in bed, when he should have been in court to testify; meaning that the defendants caused or required the engineer to affect illness to prevent his testimony being given at the trial. As counsel for the plaintiff admit in their brief, "the thought was the defendants had kept the witness from court." This fact, if proved, would have been competent. *Janvrin v. Scammon*, 29 N. H. 280. Of this fact there was no evidence. The evidence was that the engineer was sick and unable to attend the trial, but could give a deposition. The result of the colloquy between counsel in the presence of the jury was that it appeared that neither side desired his evidence in the form of a deposition. Ordinarily no inference can be drawn because a witness equally at the command of each party is not called. If a special inference should be drawn against the defendants because the engineer was still in railroad employ, the plaintiff was entitled to the benefit of it, and to argue it, and also to any inference that could be drawn from the fact that the defendants, instead of asking for leave to take a deposition in the first instance, introduced the testimony of the physician. As the case stood, neither side being willing to take the engineer's deposition, it might have been inferred that the engineer, not possessing the general habit of untruthfulness assigned by the plaintiff's counsel to all railroad witnesses in the case save one, was disposed to tell the truth, and therefore the defendants did not call him. There was no force to the inference against the defendants for not producing his testimony, except it was believed he was an honest man and would tell the truth. The jury, as the case stood, might have thought that if the plaintiff's counsel so believed there was no reason why the plaintiff should not have taken his deposition, and answered the whole fabric of the defendants' case by the statement of the one truthful railroad man. To meet this inference, or some other apparent to him, the plaintiff's counsel went out of the case and made a statement and charge, in support of which there was no competent evidence. It is argued that what counsel said was not a statement of a fact, but a request to the jury to draw an inference from the attempt of the defendants to explain by the evidence of the physician their failure to call the engineer. *Mitchell v. Railroad Co.*, 68 N. H. 96, 34 Atl. 674. But the jury were not asked to infer from the evidence an attempt to deceive, and from such inference to infer guilt of the suppression of evidence, nor could they lawfully have been asked to make such inference. If the ingenious argument now made in the brief had been attempted before the jury, it could not properly have been permitted. It contains a charge prejudicial to the defendants, of which there was no evidence, and which was not legitimately deducible from the facts proved. The case would have been one with *Jordon v. Wal-*

lace, 67 N. H. 175, 32 Atl. 174. But no such argument was made. The present case more nearly resembles *Heald v. Railroad Co.*, 68 N. H. 49, 50, 44 Atl. 77, than any other that has been cited. In that case the statement was that the defendants had tolerated a dangerous practice of lowering the gates at the crossing "for all this time"; meaning, apparently, for a long time. It was said, "The jury were told not merely that this dangerous act occurred at the time of the accident, of which there was competent evidence, but that such acts were of frequent occurrence, \* \* \* of which there was no competent evidence." In the case before us the jury were not told that the defendants had attempted to deceive as to their reason for not furnishing the testimony of the engineer, of which there was competent evidence, but that the defendants had kept the witness from court, of which there was no competent evidence. In the language used in *Herald v. Railroad Co.* the statement was "testimony upon a material point, the natural effect of which was prejudicial to the defendants." In the absence of a finding that it did not have that effect, I think (and in this view the Chief Justice concurs) that the rule as laid down and applied by the court in the cases cited, if adhered to, compels the conclusion that the trial was not a fair one, and that the error can be corrected only by a new trial. We do not think the rule should be departed from in theory or practice. A majority of the court, however, are of opinion that the remarks excepted to were not such a departure from legitimate advocacy as to require that the verdict should be set aside. The exception is therefore overruled.

An exception was claimed, based upon an objection to the argument of counsel stated to the stenographer, but not made known to the court or opposing counsel when made. For

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Waiver of  
Objection.

this reason the court refused to allow the exception, to which refusal the defendants excepted.

It does not appear when the objection was made known to the court and the exception claimed, but it is assumed this was done at the conclusion of the plaintiff's argument,—the earliest time at which the claim could have been made if not made at the time of the utterance objected to. The foundation of the rule requiring counsel to confine their argument to the facts in proof is to prevent the determination of the issue upon unsworn statements, incompetent as evidence for that reason if for no other. Hence objection to incompetent evidence of counsel in argument should be taken as to other incompetent evidence, when it is offered. "Ordinarily, objections to evidence, unless made when it is first introduced and its bearing understood, will be considered to have been waived. *Bassett v. Manufacturing Co.*, 28 N. H. 438, 452; *Taylor v. Railway Co.*, 48 N. H. 304, 309. The judge may entertain an objection to evidence made at any stage of the trial, and exclude it from consideration by the jury if justice requires it (*Judge of Probate v. Stone*, 44 N. H. 593, 607); but

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he is not bound to entertain the objection when made out of season, and a refusal to do so is not error." *Gardner v. Kimball*, 58 N. H. 202. The error of a defective or erroneous statement of the evidence by the judge in his charge affects the fairness of the trial in the same way as like statements by counsel in argument. No exception can be taken to such error in the charge of the court unless his attention is called to it at the time. *Cutler v. Welsh*, 43 N. H. 497, 499. The error in either case is not in all cases incurable. An immediate correction of the error may save the trial. At no time can such correction be made with greater probability of removing the wrongful effect than at the time of utterance. For counsel conscious of the error to be permitted to sit by without making objection until there is less probability the wrong can be cured would be to turn a rule of justice and fairness into a mere trap. *Lisbon v. Bath*, 23 N. H. 1, 9; *Lyman v. Littleton*, 50 N. H. 42, 45. The universal practice appears to have been to object upon the instant. In *Felch v. Town of Weare*, 66 N. H. 582, 27 Atl. 226, it was held that, if the party objecting for such cause gives the court to understand that he is satisfied with the amende made at the time by the party in fault, he waives his exception. If this be so, the failure to object at the time is clearly a waiver of the right to object. The refusal of the presiding justice to allow an exception to which the party objecting is not entitled as matter of law presents no question for our consideration. *Town of Monroe v. Connecticut River Lumber Co.*, 68 N. H. 89, 92, 39 Atl. 1019. It is not necessary to give reasons for the proposition that an objection is not taken until it is made known to the presiding justice and an exception claimed of him. The result is that the exceptions are overruled. From this result the Chief Justice and myself dissent, for the reasons stated.

Exceptions overruled.

Peaslee, J., did not sit. The others concurred.

The defendants moved for a rehearing upon the following grounds: (1) That the Concord & Montreal Railroad did not, and in law could not, delegate a duty of repairing the track to the Boston & Maine Railroad; (2) that the plaintiff, as between himself and the other defendants, assumed the risk of the negligence of the Boston & Maine Railroad and their servants; (3) that there was no evidence of negligence in the Boston & Maine Railroad or their employees; (4) because of the statements of the plaintiff's counsel in argument.

Pike, J. The exceptions to the denial of the defendants' motion for a nonsuit raises the questions: First, whether there was evidence from which the jury could properly find that the defendants were negligent; and, second, whether the plaintiff's knowledge that the track was owned, managed, controlled, and cared for by the Boston & Maine Railroad constituted a defense.

The law imposes upon the master the duty to use ordinary care to protect his servants from injury while they are engaged in the performance of their work. He must use ordinary care to provide them with a suitable place in which to work, and notify them of dangers of which he is aware or ought to be aware, but of which his servants by the exercise of like care are unable to inform themselves. *Mitchell v. Railroad Co.*, 68 N. H. 96, 116; *Collins v. Car Co.*, 68 N. H. 196, 198, 38 Atl. 1047. It is immaterial whether the master owns the premises where his servants are employed, or simply has permission to use them for the purposes of his business. In either event the premises are the place he provides for them in which to work. The defendants, through an arrangement with the Boston & Maine Railroad, had provided the plaintiff with the track where the accident occurred, as the place in which he was required to work. They were therefore bound to use ordinary care to keep it in suitable repair, and to learn of and inform him of dangers of which he by the exercise of like care was unable to inform himself. From the testimony of the plaintiff's witnesses that the rails were displaced and that there were rotten ties under them, the jury might reasonably find that the track was unsuitable for the work required of the plaintiff upon it, and that by ordinary care the defendants would have learned of its condition, and should have induced the Boston & Maine Railroad to repair it, ceased to make use of it if not repaired, or notified the plaintiff of the danger of the situation.

It appeared that the repairs upon the track were made by the Boston & Maine Railroad. The plaintiff knew this fact, and also that this corporation owned the track, and had the exclusive management and control thereof. Because of this knowledge, the defendants say that the plaintiff assumed the risk of injury from the track. A servant assumes the risk of injury from dangers incident to his employment, including the risk that follows the master's failure to perform his duty, only when he knows, or by ordinary care ought to know, of their existence. *Henderson v. Williams*, 66 N. H. 405, 23 Atl. 365; *Casey v. Railway Co.*, 68 N. H. 162, 44 Atl. 92; *Hardy v. Railroad Co.*, 68 N. H. 523, 536, 41 Atl. 179; *Burnham v. Railroad Co.*, 68 N. H. 567, 568, 44 Atl. 750. Although the plaintiff knew that the track was owned, managed, and controlled by the Boston & Maine Railroad, it did not appear that he knew that the defendants would not be able to induce the owners to make all necessary repairs upon it; that, failing in this, they would not cease to make use of the track, or that they would not notify him of the situation, so that he might be in a position to protect himself. It therefore cannot be held, as a matter of law, that he assumed the risk of danger that resulted in his injury. The motion for a nonsuit was properly denied.

The rule in relation to incompetent statements in a counsel's



argument is much like the rule in respect to the admission of irrelevant testimony. A trial is not fair, in a legal sense, when the verdict is procured by incompetent evidence. Nor is it fair when statements respecting matters not in evidence, but material to some issue, or matters irrelevant to every issue and calculated to prejudice the adverse party, are made by counsel, and it is not found that they did not influence the jury. *Bullard v. Railroad Co.*, 64 N. H. 27, 5 Atl. 838. So long as counsel confine their comments to the evidence and the matter in issue, it is their privilege "to arraign the conduct of parties; impugn, excuse, justify, or condemn motives, so far as they are developed in evidence; assail the credibility of witnesses when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances"; and in so doing "the largest and most liberal freedom of speech is allowed, and the law protects them in it." *Tucker v. Henniker*, 41 N. H. 317, 323. The decided cases in this state in which verdicts have been set aside on account of the conduct of counsel come within the rule which excludes incompetent matters, both in evidence and in argument. In no case has a verdict been set aside when the remarks of counsel were founded on evidence which related to a material issue, no matter what the form of the statement, how forcibly it was put, or how much it tended to prejudice the jury in favor of his client. *Mitchell v. Railroad Co.*, 68 N. H. 96, 117, 34 Atl. 674; *Dow v. Weare*, 68 N. H. 345, 44 Atl. 489; *Shute v. Manufacturing Co.*, 69 N. H. 210, 212, 40 Atl. 391. The cases in which verdicts have been set aside on this account, either in opening the case to the jury, in the examination of witnesses, or in the closing argument, may be divided into three classes: First. Where counsel have stated facts material to some issue in the case which were not or could not be put in evidence. *Tucker v. Henniker*, 41 N. H. 317, 322; *Cross v. Grant*, 62 N. H. 675, 686; *Bullard v. Railroad Co.*, 64 N. H. 27, 5 Atl. 838; *Perkins v. Burley*, 64 N. H. 524, 15 Atl. 21; *Baldwin v. Railway Co.*, 64 N. H. 596, 15 Atl. 411; *Jordon v. Wallace*, 67 N. H. 175, 32 Atl. 174; *Robertson v. Town of Madison*, 67 N. H. 205, 29 Atl. 777; *Heald v. Railroad Co.*, 68 N. H. 49, 44 Atl. 77; *Greenfield v. Kennett*, 69 N. H. 419, 45 Atl. 233. Second. Where counsel have stated facts which were not only irrelevant to every issue in the case, but also calculated to prejudice the jury. *Hilliard v. Beattie*, 59 N. H. 462; *Baldwin v. Railway Co.*, 64 N. H. 596, 15 Atl. 411; *Noble v. City of Portsmouth*, 67 N. H. 183, 30 Atl. 419; *Pearson v. Beef Co.*, 69 N. H. 584, 44 Atl. 113. Third. Where counsel have been permitted to urge the jury to draw from evidence properly in the case for one purpose conclusions which it had no tendency to prove. *State v. Foley*, 45 N. H. 466; *Harrington v. Wadsworth*, 63 N. H. 400. If, therefore, there was evidence on which the plaintiff's counsel could have

## Notes

properly based his remarks, "What! Keep a man who had been so reckless and who had done this awful thing they tell you about! keep him in their employ! keep him day after day! keep him until the present moment! keep him in his bed, when he should have been here and testified!"—and they were relevant to any of the issues he was discussing, they were legitimate. According to the defendants' theory, the accident was caused by the carelessness of their engineer in running his train too fast over the track in question. It appears that he was continued in their employment in the same capacity after the accident until they leased their road to the Boston & Maine Railroad, and that he has been employed in a like capacity by this railroad ever since. The defendants produced a physician who testified that the engineer was ill at his home, in Manchester, and unable to attend court. Upon cross-examination he testified that the engineer was able to give his deposition. The plaintiff's counsel, within the hearing of the jury, offered to suspend the trial and take his deposition; but the defendants' counsel declined, saying that they did not care to take it, but that the plaintiff could take it if he chose. The defendants' purpose in offering evidence of the illness of the engineer must have been to give the jury to understand that but for this illness they should have produced him to testify as to the speed the train was going. The object was to avoid the unfavorable inference that the jury might draw from the engineer's unexplained absence. *Bullard v. Railroad Co.*, 64 N. H. 7, 35, 1 Atl. 838. If there was no reason to question their motives when the physician's evidence was offered, there was reason to question them when they refused the offer of the plaintiff's counsel to suspend the trial and take the deposition of the engineer. The position in which the defendants stood was that they had asked the jury to believe that they were anxious to have the testimony of the engineer, but were finally forced to admit that they did not want it. The jury must have seen that the ostensible motive of the defendants in offering evidence of the engineer's illness was not the real one, and might fairly conclude that the physician's testimony was not true. The plaintiff's statement that the defendants kept the engineer in bed was only a forceful way of asking the jury to find that they did not want to use him because they knew his testimony would be hurtful to their case. The statement was legitimate argument upon the evidence in the case. Motion for rehearing denied.

Peaslee, J., did not sit. Blodgett, C. J., and Parsons, J., dissented from the conclusion that the argument of counsel was legitimate, but concurred upon the other questions. The others concurred.

## NOTES.

**Liability of Master for Injury to Employee Caused by Defective Track Owned by Another Company.**—A railroad company is responsible for injuries to its employees caused by a defective track, whether such track

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is owned by it or not. Wisconsin Cent. R. Co. v. Ross (Ill.), 53 Am. & Eng. R. Cas. 73. In this case the court said: "A railroad company is responsible for accidents caused by defective tracks. It is bound to exercise due care to safely carry the passengers and property intrusted to it. It is therefore its duty to see to it that the road which is used for such transportation is safe and in good repair, whether such road is owned by it or not. If it uses the track of another company for such purpose, it is liable for damages to its passengers or freight by reason of defects in the road of such other company so used by it. This rule applies as between the railroad company and its employees. There is no evidence that the deceased had any knowledge of the defects in the track. Where the employee of a railroad company is directed to use the road of another company in the business of his employer, he has the right to treat such road as the road of the company employing him; and every railroad company whose employees use the road of another company under its direction, or for its benefit, owes it as a duty to such employees to see that such road is not in a condition which will unnecessarily endanger their lives or limbs. The rule is thus stated in Wood, Mast. & Serv. (2d Ed.), § 357, p. 735: 'A railway company running its trains over the track of another railway is liable to its servants for defects therein, when it would be liable if the injury resulted from defects on its own track.' To the same effect are Stetler v. Railway Co., 46 Wis. 497, and cases there cited; Railroad Co. v. Kanouse, 39 Ill. 272; Elmer v. Locke, 135 Mass. 575; Snow v. Railroad Co., 8 Allen 441."

One company using by permission the track of another is liable to its servants for injuries occasioned by defects in the track. Stetler v. Chicago & N. W. R., 49 Wis. 609.

Whether Trainmen Assume Risks Arising from Defective Roadbed.— See generally, *note*, 11 Am. & Eng. R. Cas., N. S., 863 *et seq.*

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SULLIVAN

v.

NEW YORK, N. H. &amp; H. R. Co.

(Supreme Court of Errors of Connecticut, Oct. 4, 1900.)

[47 Atl. 131.]

**Accident at Crossing—Sufficiency of Train Light—Construction of Findings.** Where, in an action against a railroad company for the death of plaintiff's intestate, caused by being run over by a backing engine, the court found that a trainman's lantern, without a reflector, hung on the back of the tender, was a proper light, if the locomotive had been properly managed, and a proper lookout kept, the inference was that when no lookout was placed on the tender such light was not a sufficient one, and the finding was not an unqualified one that the light was a proper one.

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**Same—Absence of Lookout—Negligence—Question for Jury.**—Where, in an action against a railroad company for the death of plaintiff's intestate, caused by being run over by a backing engine, the court found that the light on the back of the tender illuminated a radius of but a few feet, and that the engine was running at a speed of about 12 miles an hour, its speed decreasing as it neared the place of the accident, it cannot be said that the presence of a lookout on the tender would not have prevented the accident, and hence defendant was not guilty of negligence in not having such lookout, since, as the speed of the engine decreased as it neared the place of the accident, the engine might have been moving so slowly as to have enabled a lookout to either have warned deceased or to have signaled the engineer.

**Same—Plaintiff Relieved by Defendant's Default of the Burden of Proving His Intestate Was Lawfully on Track.**—Where, in an action against a railroad company for the death of plaintiff's intestate, caused by being run over by an engine, defendant assumes by its voluntary default to disprove negligence by showing that deceased was unlawfully on its tracks, and that the company, in the operation of its engine, discharged its full duty to one thus unlawfully on the tracks, plaintiff is relieved on the hearing from proving his allegation that deceased was struck while on the crossing.

**Appeal—Correction of Record.**—Where the trial court expressly finds that a fact essential to the defense was not proved, the appellate court cannot correct the record by supplying such fact, as there may have been evidence affecting that point not before the appellate court.

**Same—Same.**—Where no appeal is taken from the refusal of the trial judge to find a fact as requested, the appellate court cannot correct the record by supplying such fact.

**Same—Review.**—Where, in an action against a railroad company for the death of plaintiff's intestate, the trial court refused to find that deceased was not at the crossing at the time of the accident, the appellate court could not assume that deceased was not on the crossing, in deciding the questions of law presented, on the facts found.

**Injury to Employee on Crossing after Working Hours—Fellow Servant Rule Not Available.\***—Where deceased was a section foreman of defendant railroad company, but was injured after working hours while on a crossing, the company's duty towards him was the same as towards a stranger, and hence it could not avail itself of the rule that an employer is not liable for an injury to an employee through the misconduct of a fellow servant.

**Same—Immaterial Finding.**—Where it does not appear, in an action against a railroad company for the death of plaintiff's intestate, caused by being run over by an engine, that the accident was caused by the failure of the men on the engine to perform any duty, a finding that defendant has failed to prove that it had performed its duty as an employer towards deceased is immaterial, unless the facts show that defendant performed the duty which it owed to a stranger rightfully crossing its tracks.

**Accident at Crossing—Negligence—Lookout Lights.**—Where a locomotive was run on the east-bound track to a station five miles distant to

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\*See note at end of case.

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take a supply of water, and was backed to the starting point after dark on the same track, instead of on the west-bound track, and without a lookout on the back of the tender, and no light except the trainman's lantern, illuminating a radius of but a few feet, and was running at the rate of 12 miles an hour when it reached the original station, at about the same time as a passenger train running in the same direction on the west-bound track, the company was guilty of such negligence as rendered it liable for the killing of plaintiff's intestate while on the crossing near the station.

**Same—Contributory Negligence.**—Where it appeared, in an action against a railroad company for injuries resulting in the death of plaintiff's intestate, that the engine which ran over deceased was backing west on the east-bound track, that a passenger train coming in the same direction on the other track reached the crossing at which deceased was injured about the same time as the engine, there was no error in refusing to hold that deceased was guilty of contributory negligence in not looking and listening before crossing.

**Appeal—Motion to Amend Record.**—Where the facts found, in an action against a railroad company for injuries resulting in the death of plaintiff's intestate by being run over by an engine, show that the accident was not caused by any incompetency of the engineer or fireman, it is unnecessary to consider a motion to amend the record so that it may appear that they were competent.

Appeal from superior court, New London county; John M. Thayer, Judge.

Action by James M. Sullivan, administrator, against the New York, New Haven & Hartford Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

It appeared from the finding that an east-bound freight train of the defendant arrived at Hampton Station at about 6 o'clock in the evening, on the 28th of October, 1898, three hours late, and that, being in need of water, the train was  
**Case Stated.** run upon a siding, south of the main double track, and west of a highway crossing which was 60 feet west of the station, and the locomotive, having been detached from the train, was by direction of the train dispatcher at Boston and of the conductor run on the south or east-bound track, to Elliot's Station, five miles east of Hampton Station, where, having taken a supply of water, it was backed west on the same track to its train west of Hampton Station. Ordinarily, trains running west take the north track. There were upon the locomotive the engineer and fireman and a brakeman. When they returned it was very dark, and a trainman's lantern, showing a white light, such as is ordinarily used for that purpose, was hung upon the rear of the tender, about four feet from the ground. It is found that this was a proper light if the locomotive had been properly operated and a proper lookout kept, but that it illuminated a radius of but a few feet, and did not serve the purpose of a reflector, and the tender

shut off the view of the persons in the cab of the engine of the space illuminated by the lantern. Such a light could ordinarily be seen for the distance of nearly a mile, but a curve and an intervening hill prevented any kind of a light from being seen from Hampton Station for more than a third of a mile. While so backing no lookout was placed at the rear of the tender. The engine approached Hampton Station at a speed of about 12 miles an hour, its speed decreasing as it neared its train west of the crossing, and the whistle was blown at the whistling post, and the bell rung for the Hampton Station crossing. It reached Hampton Station on its return about five minutes before 7. A west-bound passenger train reached the station at about the same time. No evidence was offered of the rules of the company for the operation of a locomotive under the above circumstances, or whether they have any, or whether they were complied with. When the locomotive was being coupled to its train the hat of Gallivan, the plaintiff's intestate, was found on the rear of the tender, and, as the engine was run east of the station the second time, in moving up and back on the main track to take out certain cars, Gallivan was found about 30 feet east of the station, lying between the east and west-bound tracks, severely injured, from which injuries he subsequently died. "This was the first that the men on the train knew that they had struck or run over Gallivan." Gallivan was employed by the defendant as a section foreman, and as such his working hours, as fixed by the roadmaster, who was his superior officer, were from 7:30 a. m. until 5:30 p. m. He returned home from his work on this day before 6 o'clock, and after supper left his house, which was three-quarters of a mile north from Hampton Station, and from which a highway leads to the station, saying he was going to get an oil can and have it refilled. It was a part of his duty when oil was needed to deliver at the station or on a train an oil can which was kept at a section house south of the tracks, and 450 feet east of the station. There was a shorter way than by the road from Gallivan's house to the station and section house, across the lots to the railroad, east to the station, and along the railroad to the station. "This was very frequently used by Gallivan and others, and he took this way on the night in question." It did not appear whether or not Gallivan took the oil can from the section house. The court held that upon the facts found it did not appear that the defendant was not guilty of negligence as charged in the complaint, nor that the plaintiff's intestate was guilty of contributory negligence. Further facts appear in the opinion.

Walter C. Noyes, for appellant.

Jeremiah J. Desmond and Donald G. Perkins, for appellee.

Hall, J. (after stating the facts). The substance of the reasons of appeal in this case is that the court erred in not holding,

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upon the facts found, either that the defendant was not negligent as alleged in the complaint, or that the plaintiff's intestate was guilty of contributory negligence. Unless either the absence of such negligence upon the part of the defendant, or the presence of contributory negligence upon the part of the deceased, is a necessary legal inference from the facts of record, the defendant has failed by proving such facts to sustain the burden assumed by the voluntary default of either disproving the negligence alleged or proving contributory negligence. *Lawler v. Railway Co.*, 72 Conn. 74, 43 Atl. 545; *Ebert v. Hartley*, 72 Conn. 453, 44 Atl. 723.

The complaint avers that the defendant negligently backed its engine, at great speed, from Elliot's Station to and by Hampton Station, upon the wrong or south track, without providing and placing a suitable light or reflector upon the rear of the tender, and without having a person as a lookout upon the rear of the tender, and without giving any warning of the approach of the engine, and struck the deceased when he was rightfully crossing the defendant's tracks at Hampton Station in the exercise of due care. After the default the defendant gave written notice, as required by statute, that it would disprove the above allegations, and would prove contributory negligence, and that the injuries were caused by the negligence of a fellow servant of Gallivan. The defendant now asserts that it has performed its undertaking, and that it has proved that the railroad company discharged its full duty towards Gallivan, and that Gallivan's own failure to exercise due care essentially contributed to cause his injury.

As to the performance of its own duty, the defendant argues that it had proved—First, that it was not negligent in failing to provide a suitable light as alleged, since the court has found that the light used was a proper one; second, that it was not negligent in failing to place a lookout on the rear of the tender, since the facts found show that the lantern used lighted the track for so short a distance, and that the speed at which the engine was moving was so great, and the night so dark, that such a lookout could not have seen sufficiently far along the track to have enabled him either to warn a person upon the track of the approaching engine, or to signal the engineer so that he could either have stopped the locomotive or so slackened its speed as to have avoided the accident; and, third, it has proved facts which show that the standard of duty to be applied to the defendant was only that degree of care which it was required to exercise in the operation of its engine towards a person unlawfully and unnecessarily upon its tracks.

As to contributory negligence, the defendant claims to have proved facts which show either that at the time he was struck Gallivan was not crossing the track at Hampton Station as alleged, but was upon or dangerously near the track at a point east of the station, or that if he was crossing the track he

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failed to look and listen before going upon the track. A careful examination of the finding shows that it fails to support the assumptions of facts upon which the defendant's argument rests.

Regarding the light used, the court has found that it was a proper one, if the locomotive had been properly managed, and a proper lookout kept. The court refused to find unqualifiedly that a proper light was used. The plain inference from the language of the finding is that, when no lookout is placed upon the tender, a trainman's lantern, without a reflector, hung upon the back of the tender, is not a sufficient light, when an engine upon the track for east-bound trains is backing west, in a dark evening, from one railroad station to another, and over crossings upon which people may be lawfully and properly passing, and when at the same time another train is approaching the same station and crossings from the same direction upon the other or west-bound track.

Again, it does not appear from the finding that the presence of a lookout upon the tender would not have prevented the accident. The 12 miles an hour speed decreased as the engine approached its train. That it was moving much slower than that before it reached the station or the crossing does not conflict at all with the finding, and, though the lantern upon the tender lighted the track but a few feet, the time required to move that distance may have been sufficient to have enabled a lookout to either warn Gallivan of his danger, or to signal the engineer so that he could have prevented the accident. We cannot, upon the record before us, say that the court erred in refusing to uphold the claim that in the management of its locomotive the defendant owed no duty to the plaintiff's intestate, excepting that which it owed to a person unlawfully upon its tracks.

In their brief counsel for the defendant say that the allegation of the complaint that Gallivan was struck while crossing the track at Hampton Station "is not sustained by the proof."

Upon the hearing in damages it was not necessary that this allegation should be sustained by proof to entitle the plaintiff to a judgment for substantial damages. It is one of the material allegations which the defendant attempted to disprove in order to show that the accident was not the result of its negligence. This it endeavored to do by proving that Gallivan was unlawfully upon its tracks at a point east of the station when he was struck, and by proving that the railroad company in the operation of its locomotive discharged the full duty which it owed to one thus unlawfully upon the tracks. The record contains certain evidential facts, such as that Gallivan took a certain road when he left his house on the evening in question; that he stated what he

Accident at  
Crossing—Suffi-  
ciency of Train  
Light—Construc-  
tion of Findings.

Same—Absence  
of Lookout—Weg-  
nence—Question  
for Jury.

Same—Plaintiff  
Believed by De-  
fendant's Result  
of the Burden of  
Proving His  
Intestate Was  
Lawfully on  
Track.



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was going to do; that he was found at a certain place after he was injured,—all of which tend to establish the main fact, as claimed by the defendant, that Gallivan was wrongfully upon the tracks east of the station, and not rightfully crossing the track at the station when he was struck.

**Appeal—Correc-  
tion of Record.**

But the trial court has not only not found the main fact which the defendant attempted to prove, but, with all the evidence before him, the trial judge has expressly refused to find it, upon the ground that it was not proved, as appears by the marginal note of "Not proven" upon the defendant's proposed finding of facts. This court cannot correct the record by supplying that fact so

**Same—Same.**

essential to the defendant's contention, as there may have been evidence affecting that point other than the facts before us, and as no appeal was taken from the refusal of the trial judge to find the fact as requested. Nor can this court properly say, as defendant's counsel assert in their brief, that "by no possibility" could the accident have occurred at the highway crossing, nor that the only reasonable conclusion consistent with the facts found is that Gallivan was east of the station when he was struck. It was conclusively the province of the trial court to weigh the evidence and

**Same—Review.**

decide the question of fact as to the situation of the parties when the accident happened, and, as the superior court has refused to sustain the defendant's claim upon that question of fact, we cannot, in deciding the questions of law presented, assume upon the facts stated that Gallivan was unlawfully upon the defendant's track.

The material fact averred in the complaint, that Gallivan was injured while he was rightfully crossing the defendant's track at the station, not having been overthrown upon the hearing in damages, the defendant has failed to prove such facts as it was required to prove to support its claim that by performing the duty which it owed to one unlawfully and unnecessarily upon its tracks, at a place where the defendant had no reason to anticipate a person would be walking, it discharged its full duty towards the plaintiff's intestate. The court, therefore, properly overruled the claim that the only duty which the law imposed upon the defendant, upon the facts proved, was "to take all reasonable steps to prevent an accident after the danger was discovered."

It is true that in deciding whether the railroad company performed its duty it is important to learn, not only the situation of Gallivan upon the track when the accident happened, but

**Injury to Em-  
ployee on Cross-  
ing after Work-  
ing Hours—  
Fellow Servant  
Rule Not Avail-  
able.**

also his relation to the company at that time, as a different rule may be applicable to the conduct of the company towards one of its own employees than towards a stranger. The complaint neither alleges that Gallivan was engaged in performing his duties as a section foreman when he was injured, nor that he was at any time in the defendant's employ. The court,

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however, finds that Gallivan was a section foreman in the employ of the defendant, but does not find that he was acting as the defendant's servant when he was injured. It further finds that the accident happened after the working day had closed, and Gallivan had been to his home, but rules that the men upon the engine were his fellow servants. While the defendant contends that by reason of the averments of the complaint, as well as from the facts found, the only proper standard by which the defendant's action in operating the engine in the manner it did is to be judged is the degree of diligence and foresight which the law requires a railroad company to exercise towards one not an employee, it seems also to be claimed that the ruling that the men upon the engine were fellow servants of Gallivan indicates that the court held that he was acting as the defendant's servant when he was struck, and that, in deciding whether it had been proved that the defendant was without negligence, the court applied the law of master and servant, but erroneously failed to apply the rule which exonerated the defendant from liability for an injury caused by the misconduct of the fellow workmen of the deceased.

Whether we look at the allegations of the complaint or at the facts found, we think the true test of the defendant's negligence in this case is not the legal obligation which a railroad company is under towards its workmen employed upon the tracks, but that the rule to be applied is that which defines its duty towards a stranger.

Same—Immaterial Finding.

That Gallivan, when injured, was acting as the defendant's servant was no part of the plaintiff's case, and is inconsistent with the defendant's principal claim that he should be regarded as a stranger. That he was an employee, and may have been acting as such at the time of the accident, is mainly important as furnishing some basis for the defendant's claim that, if he was not to be considered a stranger, his injury was the result of the fault of his co-employees. To have availed itself of the rule that an employer is not liable for an injury sustained by an employee through the misconduct of a fellow servant, the defendant should have shown—First, that Gallivan was engaged as an employee at the time he was injured; second, that the accident was the result of the misconduct of other employees; and, third, that the relation of the latter to the deceased was that of fellow servants. At the defendant's request, the court ruled as a matter of law that the engineer, fireman, and brakeman were fellow servants of the plaintiff's intestate, who was a section foreman. But neither that ruling, nor any statement in the record, is equivalent to a finding that Gallivan was engaged in his employment as section foreman when injured. Nor does it appear that the accident was caused by the failure of the men on the engine to perform any duty imposed upon them. Apparently it was not the duty of either the engineer or the fireman to leave his post

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and act as a lookout upon the back of the tender, nor to require the brakeman to act in that capacity. It does not appear that the brakeman had any duty to perform upon the engine, nor that it was the duty of any of these persons to provide a different light, or a reflector, and cause it to be placed on the rear of the tender. The negligence charged in the complaint is that of the railroad company. The engine was run to Elliot's Station and back in the manner stated by direction of the train dispatcher and the conductor, and apparently not in violation of any rule or direction of the defendant company. If, therefore, the trial court held that the defendant had failed to prove that it had performed its duty as an employer, and by so ruling applied too high a standard of duty, it is immaterial unless the facts, when tested by the other standard, namely, the duty which the railroad company owed to a stranger rightfully crossing its tracks, show that the defendant performed its duty. Applying the latter test, we think the court did not err in holding that the facts fell short of proof that the defendant performed its full duty.

Railroad companies know that at highway crossings, and often at stations, people are liable to be crossing the tracks, and that they have the right to do so. The law requires that, for the protection of human life, all trains, cars, and engines shall be so managed that, when nearing such places, proper warning of their approach shall be given to persons who may be about to cross the track, and that the utmost vigilance shall be exercised to discover any one upon the track, in order that those in control of the train may do everything possible to avert an accident. Proof that the defendant's locomotive was run by this station and crossing at 7 o'clock in the evening, in such a manner that none of those upon it could see a person upon the track before them, and under such circumstances that one rightfully and with reasonable care crossing the track upon which the engine was coming might receive no warning of its approach, is not proof of facts which show, as a matter of law, that the railroad company was free from negligence. The facts relied upon by the defendant in the argument as establishing contributory negligence, namely—First, that Gallivan negligently placed himself in a dangerous position by walking upon or near the tracks east of the station; and, second, that if he was lawfully crossing the track he failed to look and listen,—are not found, nor do they necessarily follow from the facts which are found.

In showing that it does not appear from the record that the defendant was without negligence, we have already pointed out that the alleged fact that Gallivan was lawfully crossing the track when injured does not conflict with the finding, and that the trial court has refused to find that Gallivan was walking upon or near the track, as the defendant claims. The

Accident at  
Crossing—Negli-  
gence—Lookout  
Lights.

## Note

first ground, therefore, of the defendant's claim as to contributory negligence, requires no further discussion.

That Gallivan failed to look and listen before crossing the tracks is an assumption which is not necessary in order to reasonably explain the manner in which the accident happened.

When we consider that the engine was backing west upon the east-bound track, and that a passenger train coming in the same direction upon the other track reached Hampton Station at about the same time with the backing engine, it is easy to see how Gallivan, having looked and listened, may have seen and heard only the approaching passenger train, and may, under all the circumstances detailed in the finding, have reasonably supposed that while he was passing over the east-bound track he was in no danger from a train coming west upon that track. There was no error in refusing to hold "that, as a conclusion of law from the facts, the plaintiff's intestate was guilty of contributory negligence."

Since the facts show that the accident was not caused by any incompetency of the engineer or fireman, it is unnecessary to consider the motion to amend the record so that it may appear that they were competent men. There is no error. The other judges concurred.

Same Contributory Negligence.  
Appeal—Motion to Amend Record.

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NOTE.

**Injury to Employee after Working Hours—Liability of Master.**—An employee of a railway company had finished his day's work, had left the workshop and grounds of the company, and as he was going along the street a repair train of the company passed, and one of the employees on the train, in accordance with a custom of the employees, pitched off a stick of wood to take home, and struck and injured the plaintiff. *Held*, that the liability of the company for the act causing the injury was not to be gauged by the law applicable to fellow servants. *Fletcher v. Baltimore & P. R. Co.* (U. S.), 9 Am. & Eng. R. Cas., N. S., 229.

A person who is employed by a company as a day laborer, reporting daily for service, and subject to call, but allowed to attend to other business when not needed for the day, and who gets on a train for his own purposes when "off duty," occupies the position of a passenger. *McDaniel v. Highland Ave., etc., R. Co.*, 90 Ala. 64.

## GRADERT

v.

CHICAGO &amp; N. W. RY. CO.

*(Supreme Court of Iowa, Oct. 25, 1899.)*

[80 N. W. 559.]

**Collision—Personal Injuries—Who Are Passengers.\***—Where one goes to a depot to take passage on the way car of a freight train, and, going to the place where passengers for that train are ordinarily received, enters the car, having a ticket, he becomes a passenger, and does not cease to be one where he leaves the car merely to avoid the collision of a train running into the rear of the car, and after getting out is injured by the collision.

**Sufficiency of Evidence.**—That a passenger left the way car of a freight train merely to avoid the collision of a train running into the rear of the car may be inferred from testimony that he ran out of said car and onto the flat car in front of it just as the collision occurred.

**Weight of Evidence—Question for Jury.**—The weight of evidence is to be determined by the jury, though opposed to the testimony of one witness is that of many others.

Appeal from district court, Crawford county; S. M. Elwood, Judge.

Action at law to recover damages for the death of Neils Jorgensen, resulting from a collision on defendant's line of road at the town of Denison. Trial to the jury. At the conclusion of the evidence the court directed a verdict for defendant, and plaintiff appeals. Reversed.

George Richardson and J. P. Conner, for appellant.

Hubbard, Dawley & Wheeler, for appellee.

Deemer, J. The deceased, who lived at or near the town of Vail, in Crawford county, desiring to transact some business at Denison, purchased a ticket at Vail to Denison and return, and immediately left for the latter place. After concluding his business he went to the depot, intending to take a freight train known as "No. 24" from Denison to his home. The train arrived at Denison, and stopped in such position as that the way car was some 10 rods west of the depot. Deceased asked the defendant's day operator if he could ride on the train, and was informed that he could. He thereupon went to the way car and got upon the front platform. Whether or not he entered

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\*See notes at end of case.

the car is a matter of dispute. The way car stood at a place where passengers ordinarily got on and off, and we are satisfied there was such an invitation to enter the car as that if he did so he became a passenger. Shortly after the deceased went to the car, another train, known as "No. 26," coming from the west at a high rate of speed, ran into the rear end of the way car which deceased entered or was intending to enter, tearing it to pieces and derailing some of the flat cars which were in front of the way car. The collision resulted in the death of Jorgensen. There is a serious dispute in the evidence as to where the deceased was when the collision occurred. Plaintiff contends that he was in the way car, and was in the act of making his escape by running onto one of the forward flat cars at the time the collision occurred, while defendant insists that the evidence shows without dispute that he never entered the way car, but had taken his position on one of the flat cars, and was standing there when the accident happened. Defendant further contends that deceased was warned of his danger from the approaching train in time to escape, and that the death of the deceased was due to his own negligence.

In support of the ruling of the trial court it is contended that, as deceased never entered the way car, he did not become a passenger, and that the defendant owed him no active duty. Two propositions are relied upon by appellee: (1) That the deceased did not become a passenger upon its train; and (2) that he was guilty of contributory negligence. In solving these questions, we must take that view of the case most favorable to plaintiff. There is evidence tending to show that when the deceased went to the depot at Denison he inquired of defendant's agent if he could ride upon the train which he afterwards boarded, and was informed that he could; that deceased then started west, and got upon the platform of the way car, which was standing at a place where passengers were ordinarily received and discharged. On this point defendant's agent said that he told Jorgensen that he had better stay where he was, as the train was going to pull up, and that the way car would be opposite the depot. But this same witness said on cross-examination that he "saw Mr. Jorgensen go down there to take the train to go east. I have seen passengers get on and off the way car down where it was. They generally get on and off there. I never heard of any objections. I was not making the point with him that he could not get on any place except the platform, but was making the point that he did not have to walk down there; if he would wait, the train would back up on the side track, and he could get on there." There can be no question then but that the jury may well have found that deceased was justified in boarding the car where he did. If he in fact boarded the car, he became a passenger, and should be so treated, unless the evidence shows that he voluntarily annulled that relation by stepping aside for some purpose of his own. That he did not do this

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the jury may well have found from the testimony of one of plaintiff's witnesses, who testified that he saw the deceased run out of the way car, and onto and upon the flat car, just as the collision occurred. This witness is quite positive in his statements, and, while a great number of witnesses gave evidence the other way, yet we do not think it is a case for the application of the rule announced in *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235. It is more nearly akin to *Phillips v. Phillips*, 93 Iowa, 615, 61 N. W. 1071, where we announced the following rule: "While the trial court may determine as to whether the contestants have given evidence sufficient to support a verdict if one should be returned in their favor, it could not, under the rule announced in case of *Meyer v. Houck*, pass upon the question as to whether the preponderating weight of all the evidence is in favor of or against the contestants. This is a question always for the jury. So it is for the jury to determine as to the weight of the evidence, though there be one witness testifying on one side to certain facts, and many witnesses on the other side testifying to a contrary state of facts. It is not the province, in such a case, of the court to pass upon the credibility of the several witnesses, and to say which one told the truth, or that the story of one is more likely to be correct than that of another. The ruling laid down in the *Meyer Case* does not justify any such contention. To do so would be equivalent to doing away with jury trials." It must not be forgotten that deceased went to the depot for the purpose of taking the train; that he went to the place where passengers for that particular train were ordinarily received; that he entered upon the train, and had a ticket authorizing him to ride to the town of Vail. If he had been injured while mounting the steps of the way car, or while passing from the platform into the car, there would be no doubt of his right to recover. When he mounted the steps and went upon the platform of the car with the implied consent of the carrier, he became a passenger; and, as he did not leave the train for any purpose of his own, he did not cease to be a passenger when he went on the flat car. His going on this car is only material in view of the circumstances shown by this record on the issue of contributory negligence. That issue was, under the facts disclosed, purely a question of fact for the jury. That body may have found that the position of the deceased did not in any manner contribute to his injury. The cases cited by appellant are not in point. As sustaining our conclusions, see *Hutch. Carr.* p. 657; *Keith v. Pinkham*, 43 Me. 501; *Moakler v. Railway Co.*, 18 Or. 189, 41 Am. & Eng. R. Cas. 135, 22 Pac. 948; *Doggett v. Railroad Co.*, 34 Iowa, 284; *Allender v. Railroad Co.*, 37 Iowa, 264; *Buffett v. Railroad Co.*, 40 N. Y. 168; *Parson v. Railroad Co.*, 113 N. Y. 355, 21 N. E. 145; *Poucher v. Railroad Co.*, 49 N. Y. 263. The trial court was in error in directing a verdict, and its judgment is reversed.

## Notes

## WHO ARE PASSENGERS.

**Persons Assisting Departing Passengers.**—See *Whitley v. Southern Ry. Co.* (N. Car.), 12 Am. & Eng. R. Cas., N. S., 210, and *note*, 212 *et seq.*

**Person Assisting Sick Passenger.**—A conductor having knowledge that a person is assisting a sick passenger owes such person the same duty that he owes an ordinary passenger. *Louisville & N. R. Co. v. Crunk* (Ind.), 41 Am. & Eng. R. Cas. 158.

**Bridge Superintendent Riding over Incompleted Road.**—A superintendent of construction who requests a bridge superintendent, in the course of his employment, to go to a point on the line where the construction is incomplete, does not on behalf of the company invite the bridge superintendent to become a passenger; therefore a superintendent of bridges who sues the company as an employee for injuries occasioned while riding on a portion of the road not completely constructed cannot contend that he was a passenger on the train, and as such entitled to all the privileges of a passenger holding a ticket. *Evansville & R. R. Co. v. Barnes*, 137 Ind. 306.

**Children.**—While the tender years of a plaintiff may excuse him, if he had occupied the relation of a passenger, from the effect of his own contributory negligence, it cannot create that relation. So *held*, where an infant was injured while riding on a hand-car at the invitation of employees of the company, but in violation of the rules of the company, the car being provided for the exclusive use of the company's employees and their tools. *Gulf, C. & S. F. R. Co. v. Dawkins*, 77 Tex. 228, 13 S. W. Rep. 982.

Where a child of nine years of age enters a passenger train with her mother, who has provided herself with a ticket, the child is a passenger, whether the contract of carriage, if any, is made with her or with her mother, and as such she is not entitled to be carried unless paid for. *Beckwith v. Cheshire R. Co.*, 27 Am. & Eng. R. Cas. 192, 143 Mass. 68, 8 N. E. Rep. 875.

By statute, railway companies were bound to carry by certain trains children under three years of age without charge, and entitled to half fare for children between three and twelve years of age. Plaintiff's mother carrying in her arms the plaintiff, a child of three years and three months, took a ticket for herself by one of these trains, but did not take a ticket for the plaintiff. In the course of the journey an accident occurred through the negligence of the defendants, and plaintiff was injured. At the time plaintiff's mother took her ticket, no question was asked by defendant's servant as to the age of the child, and there was no intention on the part of the mother to defraud the company. *Held*, that plaintiff was entitled to recover for the injuries he received. *Austin v. Great Western R. Co.*, L. R., 2 Q. B. 442.

**Circus Employee.**—In *Robertson v. Old Colony R. R. Co.* (Mass., June 22, 1892), 31 N. E. Rep. 650, it was held that where a railroad company contracted with circus proprietors to haul the cars of the latter, and by the terms of the contract the company had no control over the condition of the cars or power to interfere with them, an employee of the proprietors on board one of their cars did not stand in the relation of a passenger to the railroad company so as to render the latter liable for an injury



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received by him by reason of the derailment of one of such cars caused by the improper condition of its trucks.

**Employees Riding to and from Work.**—See *Chattanooga Rapid-Transit Co. v. Venable* (Tenn.), 19 Am. & Eng. R. Cas., N. S., 768, and *foot-note*, 769.

**Whether Express Messengers Are Passengers.**—See *Voight v. Baltimore & O. S. W. Ry. Co.* (C. C.), 9 Am. & Eng. R. Cas., N. S., 835, and *foot-note*.

**Whether Mail Clerk Is a Passenger Entitled to Recover for Injuries Received through the Negligence of the Railroad Company.**—See *Louisville & N. R. Co. v. Kingman* (Ky.), 5 Am. & Eng. R. Cas., N. S., 401, and *note*, 405 *et seq.*; *Foreman v. Pennsylvania R. Co.* (Penn.), 17 Am. & Eng. R. Cas., N. S., 246, and *foot-note*.

**Persons Being Transferred around Washout or Wreck.**—See *Conroy v. Chicago & C. Ry. Co.* (Wis.), 8 Am. & Eng. R. Cas., N. S., 714, and *note*, 727.

**Persons Traveling on Train by Permission of Employees.**—See *Louisville & N. R. Co. v. Scott's Adm'r* (Ky.), 17 Am. & Eng. R. Cas., N. S., 261, and *note*, 266 *et seq.*

**Porter on Sleeping Car.**—The porter on a sleeping car is not a passenger. *Hughson v. Richmond, etc.*, R. Co., 2 App. Cas. (D. C.) 98. But see *Jones v. St. Louis S. W. R. Co.*, 125 Mo. 666, 26 L. R. A. 718, (an action for injuries to plaintiff while he was traveling on defendant's line as a porter on a Pullman sleeping car), in which the court said, in delivering the opinion: "Plaintiff was transported over defendant's road under a contract which was supported by a sufficient consideration, and he was entitled to the rights of a passenger, in respect of the careful running and management of the train. The rights of plaintiff, and the obligations of defendant to him, under this contract, do not differ materially in these respects from those which are implied under contracts between a transportation company and the government, by which the former agrees to carry the agents which have charge of the mails; or under contracts with express companies, to transport their agents who are in charge of their business; or with shippers of live stock, to carry the persons in charge of the stock. Under these contracts the persons carried are uniformly held to be entitled to the protection of passengers. *Mellor v. Missouri Pac. R. Co.*, 105 Mo. 460, 10 L. R. A. 36; *Graham v. Pacific R. Co.*, 66 Mo. 536; *Tibby v. Missouri Pac. R. Co.*, 82 Mo. 300; *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239, 57 Am. Rep. 382; *Hutchinson, Carr.* §§ 564, 565; *Kenney v. New York Cent. & H. R. R. Co.*, 125 N. Y. 422."

**Stockman Traveling on Drover's Pass as Passenger.**—See *Chicago & A. R. Co. v. Winters* (Ill.), 12 Am. & Eng. R. Cas., N. S., 93, and *note*, 103 *et seq.*

**Passenger Must Have Offered Himself to Be Carried.**—The existence of the relation of passenger and carrier is only to be implied from such circumstances as will warrant an implication that the one has offered himself to be carried and the other has accepted the offer and has received him to be properly cared for until the trip is begun, and to be then carried over the railroad. *Webster v. Fitchburg R. Co.*, 58 Am. & Eng. R. Cas. 1, 161 Mass. 298, 37 N. E. Rep. 165; *Dodge v. Boston & B.*

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Steamship Co., 37 Am. & Eng. R. Cas. 67, 148 Mass. 207. The relation of carrier and passenger must be created either by express or implied contract. The purchase of a ticket alone does not create the relation. He must in some manner indicate his purpose of becoming a passenger, and place himself in charge of the carrier. So *held*, where a party, instead of waiting in the station house for a train, remained at a boarding house some two or three hundred feet from the depot until the arrival of the train, and endeavored to get on the train after it was in motion and was injured. *Spanagle v. Chicago & A. R. Co.*, 31 Ill. App. 460. Compare *Gordon v. Grand St. & N. R. Co.*, 40 Barb. (N. Y.) 546.

**Consent of Carrier.**—No person becomes a passenger except by the consent, expressed or implied, of the carrier. *Hoar v. Maine C. R. Co.*, 70 Me. 65.

**Acceptance by Carrier.**—An instruction in an action against a railroad company to recover for personal injuries, which in effect declares that if the plaintiff got on the steps of the car which caused the injury, for the purpose of getting upon the platform as a passenger, with the intention of paying his fare when called upon, he became a passenger without regard to the fact as to how, when, or where he got upon the step of the car, and which wholly ignores the fact whether or not the defendant ever agreed to accept plaintiff as a passenger, or did any act indicating an intention to accept him as such, is erroneous. *Schafer v. St. Louis & S. R. Co.* (Mo.), 30 S. W. Rep. 331.

**Contract for Future Transportation.**—In *Dovonan v. Hartford St. R. Co.*, 65 Conn. 201, it was held that a mere contract for future transportation cannot of itself create the relation of carrier and passenger.

**Purchase of Ticket Alone Does Not Create the Relation.**—*Schurr v. Houston*, 10 N. Y. S. R. 262; *Spanagle v. Chicago & A. R. Co.*, 31 Ill. App. 460.

**Possession of Ticket Immaterial as Constituting Relation.**—The possession of a ticket is immaterial as constituting the relation where the person was lawfully on a proper train with the knowledge of the company, for the purpose of being transported as a passenger. *Secord v. St. Paul, M. & M. R. Co.*, 5 McCrary (U. S.) 515, 18 Fed. Rep. 221.

**Purchase of Ticket Not Necessary to Establish Relation of Carrier and Passenger.**—See *St. Louis & S. F. R. Co. v. Kilpatrick* (Ark.), 17 Am. & Eng. R. Cas., N. S., 212, and *foot-note*.

**Person Attempting to Ride on Nontransferable Ticket.**—If a person in good faith presents a commutation ticket which was issued to another and is not transferable, and his claim to be carried thereon is recognized, and he is carried as a passenger, he is entitled to the rights of a passenger, *i. e.*, to be carried safely, and to have a secure place to stop and leave the road. *Robostelli v. New York, N. H. & H. R. Co.*, 34 Am. & Eng. R. Cas. 515, 33 Fed. Rep. 796. Defendant had issued a free pass, not transferable to a newspaper reporter, and on the ticket was a memorandum to the effect that any person other than the person named in the pass should be subject to a penalty for using the pass, or that he should be liable to pay fare. Plaintiff while traveling on the business of the journal, was entitled by usage to a privilege of this nature, but took a ticket in which another reporter of the same journal was named. On several occasions before, he had made use of such tickets with the knowl-

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edge of some of defendant's officers and employees. The reporter received an injury, for which he brought suit. *Held*, that it was for the jury to say whether he was lawfully on the train. If the use of the ticket was unauthorized and the plaintiff thereby became liable for increased fare, he could not be considered as a trespasser. *Great Northern R. Co. v. Harrison*, 10 Exch. 376.

**Round-Trip Ticket.**—If the traveler is in good faith using a pass or ticket which he believes to be available, or if his right to travel upon it is recognized, the duty which the carrier owes him is that which a carrier owes a passenger. Accordingly, where a person was induced to believe by the conduct and language of the carrier's employees that he had a contract for a round trip, it was held that he was a passenger. *Russ v. The War Eagle*, 14 Iowa 363.

**Adult Son Riding on Family Commutation Ticket.**—A son, although he has reached his majority, is entitled to all the rights of a passenger while riding on the family commutation ticket, if he resides with his father as a member of his family. *Chicago, etc., R. Co. v. Chisholm*, 79 Ill. 584.

**Right to Ride on Ticket Purchased of Scalper.**—Where a person purchases a railroad ticket from a dealer outside the limits of this state who is not an authorized agent of the company, he may maintain an action in the courts of this state against the company for a refusal to carry him on said ticket, notwithstanding the provisions of the act of May 6, 1863 (P. L. 582), making it unlawful for an unauthorized party to sell railroad tickets in this commonwealth. *Sleeper v. Pennsylvania R. R. Co. (Penn.)*, 9 Am. & Eng. R. Cas. 291, 45 Am. Rep. 380, 100 Pa. St. 259.

**Necessity of Payment of Fare.**—The actual payment of fare is not essential to the status of a passenger on a train. *Gordon v. Grand St. & N. R. Co.*, 40 Barb. (N. Y.) 546; *Florida Southern R. Co. v. Hirst*, 52 Am. & Eng. R. Cas. 409, 30 Fla. 1, 11 So. Rep. 506; *Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342; *Pennsylvania R. Co. v. Price*, 1 Am. & Eng. R. Cas. 234, 96 Pa. St. 256.

Regardless of compensation to the carrier, a party lawfully on a car and entitled to transportation is a passenger, and is entitled to recover for an injury resulting from the negligence of the carrier or its servants, if the injury occurs without fault on his part. *Gulf, C. & S. F. R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. Rep. 280.

It is enough, to fix the liability of a carrier for injuries occasioned by the negligence of its servants, that the passenger be lawfully on the train, whether by reason of having paid his passage-money or by permission or invitation of officers or agents of the company. *Prince v. International & C. N. R. Co.*, 21 Am. & Eng. R. Cas. 152, 64 Tex. 144.

Where one, although he has paid no fare, is on a car with the knowledge and permission of the person in charge thereof, he is a passenger and is entitled to the same care and protection as if he had paid fare. *Muehlhausen v. St. Louis R. Co.*, 28 Am. & Eng. R. Cas. 157, 91 Mo. 332, 2 S. W. Rep. 315; *Sherman v. Hannibal & St. J. R. Co.*, 72 Mo. 65; *Buck v. People's St. R. E. L. & P. Co.*, 46 Mo. App. 555.

In *Ohio & Miss. R. Co. v. Muhling*, 30 Ill. 1, the court, in delivering the opinion, said: "It is, however, urged that the plaintiff had paid nothing for his passage. This can make no difference, as the company

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had the right to demand the fare at the time he came upon the road, and upon failing to pay might have put him from the cars. Or they might have afterwards collected it, or, if the company was indebted to him, \* \* \* they could have deducted it from that indebtedness. But even if they were carrying him gratuitously it could make no difference. *Gillwater v. Madison & I. R. Co.*, 5 Ind. 339; *P. & R. R. Co. v. Derby*, 14 How. (U. S.) 468. When a person is upon a train under such circumstances, the only inquiry is whether he was lawfully there, and if not, whether he paid his money for the privilege. So that in point of fact it can make no difference in this case whether the plaintiff in error had paid for his passage, or whether he was there by permission to be carried without compensation, as it does not appear that he was there unlawfully."

A carrier is liable to persons whom it accepts as passengers, and of whom it demands no fare, to the same extent as it is liable to persons who pay fare. *Cleveland, C. & St. L. R. Co. v. Ketcham*, 133 Ind. 346, 33 N. E. Rep. 116.

**Effect of Offer to Pay Fare to Unauthorized Employee.**—An offer to pay fare to a trainman who is unauthorized to receive fares, is not an offer to the company, and does not entitle the person to the rights of a passenger who has paid. *Cleveland, C. & C. R. Co. v. Bartram*, 11 Ohio St. 457.

**Person Fraudulently Evading Payment of Fare.**—Where one gets on a passenger train with the deliberate purpose not to pay his fare, and adheres to that purpose, or if, being on the train, and having money with him with which he could pay his fare, he falsely and fraudulently represents to the conductor that he is without means to pay his fare, and by means of such false representations induces the conductor to permit him to remain on the train without paying his fare, the relation of carrier and passenger, and the obligations resulting from that relation, are not thereby established between him and the company, and the company owes him no other duty than not to willfully or recklessly injure him. *Railroad Co. v. Mehlsack*, 131 Ill. 64, 41 Am. & Eng. R. Cas. 60; *Condran v. Chicago, M. & St. P. R. Co. (C. C. A.)*, 67 Fed. Rep. 522; *Railway Co. v. Brooks*, 81 Ill. 250; *Railroad Co. v. Michie*, 83 Ill. 431; *Railway Co. v. Beggs*, 85 Ill. 84; *McVeety v. Railway Co.*, 45 Minn. 269, 47 Am. & Eng. R. Cas. 471; *Robertson v. Railway Co.*, 22 Barb. 91; *Railway Co. v. Nichols*, 8 Kan. 505; *Prince v. Railroad Co.*, 64 Tex. 146, 21 Am. & Eng. R. Cas. 152; *Railway Co. v. Campbell*, 76 Tex. 175, 41 Am. & Eng. R. Cas. 100; *Way v. Railway Co.*, 64 Iowa 48; *Way v. Railway Co.*, 73 Iowa 463, 34 Am. & Eng. R. Cas. 286.

**Pass Procured by Fraud.**—If a ticket is procured by fraud, the fraud will vitiate the contract, and the person using it will not be entitled to the rights of a passenger. Thus, where a shipper of stock in order to obtain a pass, represented that his wife was owner of part of the stock, the right to a pass being limited to such persons, it was held that the contract of carriage was vitiated by the fraud. *Brown v. Missouri, K. & T. R. Co.*, 64 Mo. 536.

**Person Allowed to Remain, after His Refusal to Pay Fare, Because of Threats to Resist.**—But if a person has entered a car and is allowed to remain upon it after refusal to pay his fare because of threats to resist

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removal by force, he cannot be deemed a passenger, and the company owes him no personal duty. *Gilmer v. Highley*, 110 U. S. 47; 3 Mont. 90. If, however, the refusal to pay fare is justifiable, the traveler does not forfeit his rights as a passenger. Thus, where a person entered a car which started before he had an opportunity to leave it, and the conductor failed or refused to provide him with a seat as required by law, his refusal to pay fare was justifiable, and he did not forfeit any of the rights of a passenger. *Hardenbergh v. St. Paul, M. & M. R. Co.* (Minn.), 34 Am. & Eng. R. Cas. 359; *Allender v. Chicago, R. I. & P. R. Co.*, 37 Iowa 264.

**Mere Failure to Order from Train.**—The failure of those in charge of a train on which a person had wrongfully taken passage, to warn him to get off, cannot be construed into a permission to become a passenger on the train. *Brown v. Scarboro*, 58 Am. & Eng. R. Cas. 364, 97 Ala. 316, 12 So. Rep. 289.

**Entry into Cars Not Essential.**—Entry into the cars of the company is not always necessary to create the relation of passenger and carrier. *Allender v. Chicago, R. I. & P. R. Co.*, 37 Iowa 264; *Norfolk & W. R. Co. v. Galliher*, 89 Va. 639; *Baltimore & O. R. Co. v. State*, 21 Am. & Eng. R. Cas. 202, 63 Md. 135; *Warren v. Fitchburg R. Co.*, 8 Allen (Mass.) 227; *Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342.

In *Hansley v. Jamesville, etc., R. R. Co.*, 115 N. Car. 602, 44 Am. St. Rep. 474, it was held that the contract of carriage begins when the passenger comes upon the carrier's premises, or upon its means of conveyance, with a purpose of purchasing a ticket within a reasonable time, or after having purchased a ticket. The relation once constituted continues until the journey, expressly or impliedly contracted for, has been concluded, and the passenger has left the carrier's premises, or has been allowed a reasonable time to leave such premises. 2 Am. & Eng. Enc. Law 742-745.

A purchaser of a ticket with the intent to ride thereupon is to be considered a passenger while going from the ticket office to take his seat in the cars, and is entitled to the rights of a passenger from the time of the purchase of a ticket. *Warren v. Fitchburg R. Co.*, 90 Mass. 227.

Having purchased ticket, the waiting at the regular place of departure to take the cars constitutes one a passenger. *Central R. & B. Co. v. Perry*, 58 Ga. 461, 16 Am. Ry. Rep. 122.

Where by the contract contained in a drover's pass, it was stipulated that its acceptance should be considered "a waiver of all claims against the company for personal injury when received on the above train," and the plaintiff was injured before entering the train, but after it had been formed and was about to start, it was held that plaintiff was a passenger and bound by the stipulation although not actually upon the train. *Poucher v. New York C. R. Co.*, 46 N. Y. 263, 10 Am. Rep. 364.

But in *Indiana C. R. Co. v. Hudelson*, 13 Ind. 325, where it appeared that while plaintiff, without having procured a ticket, was crossing the side track of a railroad to get upon a passenger train at its usual place of stopping on the main track, he was run over by a train which was thrown in upon the side track through the negligence of the defendant railroad's employees in leaving a switch open, it was held that plaintiff was not a passenger, and that his right to cross the side track was only the right that persons have to cross a railroad upon a public street or highway.

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**In Waiting-Room.**—Being within the waiting-room, waiting to take the cars, is as effectual to make a person a passenger as if he be within the body of one of the cars. *Gordon v. Grand St. & N. R. Co.*, 40 Barb. (N. Y.) 546.

**Using Empty Car as Waiting-Room by Permission of Station Agent.**—While a lady passenger was waiting with two others in the waiting-room of a depot, some persons came in to clean the room. The three ladies asked the ticket agent for leave to sit in his office while the room was being cleaned, which was refused, as his office was to be cleaned also. They then asked the ticket agent for leave to sit on the platform, but this request was also refused, as against the rules of the company. The agent then told them that they might go into some empty cars standing beside the platform, which they did. They had not been there long when, without notice, the cars were suddenly and without signal moved out of the station. The occupants hurriedly passed to the end of the car (which was the rear one) and jumped. The plaintiff was injured in so doing. There was no employee of the road on the cars, and the cars were still abreast the platform when plaintiff jumped. *Held*, that the plaintiff was a passenger while in the car. *Shannon v. Boston & A. R. Co.*, 23 Am. & Eng. R. Cas. 511, 78 Me. 52, 2 Atl. Rep. 678.

**Person Riding to Station in Company's Stage.**—Where a railroad company runs a stage for the purpose of carrying passengers to and from its depot, a person who is riding in the stage to the station for the purpose of taking passage on a train is a passenger and entitled to recover damages for an injury received through the negligence of the stage-driver, though he has not bought a ticket nor made any declaration of his intention to do so. *Buffett v. Troy & B. R. Co.*, 40 N. Y. 168; *Bissell v. Michigan S. & N. I. R. Co.*, 22 N. Y. 258.

In this case it appeared that defendant made a contract with D. to run a stage coach for a daily compensation, between a station on its line and a village a mile distant. D. was furnished with railroad tickets which he sold from the station to various places on the railroad, generally at the station, sometimes on the coach. Plaintiff took the coach, for the purpose of traveling upon a train, but was injured before reaching the station. *Held*, that he was a passenger, and that defendant was liable.

**While Walking upon Connecting Steamboat.**—A person who is injured while walking from a connecting steamboat to a railway by the customary route, is injured while traveling by public conveyance within the meaning of a policy which insures against personal injuries when caused by any accident while traveling "by any public or private conveyance provided for the transportation of passengers." *Northrup v. Railway Passenger Assur. Co.*, 43 N. Y. 516, *reversing* 2 Lans. (N. Y.) 166.

**Person in Ticket Office Refused a Ticket.**—A person in a railroad ticket office, for the purpose of buying a ticket, is entitled to be protected as a passenger, though the agent refuses to sell him a ticket. *Norfolk & Western R. R. Co. v. Galliker*, 89 Va. 639.

**Boarding Train without Permission.**—A person boarding a train without the knowledge or permission of the conductor, is nevertheless a passenger if allowed to remain as such, by the conductor. *Sherman v. Hannibal, etc., R. Co.*, 72 Mo. 65, 37 Am. Rep. 423.

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**Boarding Train at Place Other Than Depot.**—If a railroad company permits passengers to take trains at a place which is not a depot, a person taking the train at such place is not a trespasser; and when he has reached in safety the inside of a passenger car, he then, if not before, becomes a passenger. *Dewire v. Boston & Maine R. Co. (Mass.)*, 37 Am. & Eng. R. Cas. 57.

**Persons Hailing Street Car, etc.**—If a person has hailed a street car or omnibus, and it has stopped for the purpose of enabling him to enter, the stopping implies a consent to accept such person as a passenger, and the carrier is liable for injuries to him whilst attempting to get upon it. *Smith v. St. Paul City R. Co. (Minn.)*, 16 Am. & Eng. R. Cas. 310; *Brien v. Bennett*, 8 C. & P. 724.

**Person Waiting in Station for Horse-Car after Missing His Train.**—A person who enters a railway station intending to take a certain train, and finding it gone, waits in the station for a horse-car, is not a passenger, and the company is not under the duty as to him of keeping its premises safely lighted. *Heinlein v. Boston & Providence R. Co. (Mass.)*, 33 Am. & Eng. R. Cas. 500.

**Boarding Moving Train.**—See *Illinois Cent. R. Co. v. O'Keefe (Ill.)*, 9 Am. & Eng. R. Cas., N. S., 611, and *note*, 619 *et seq.*

But a person, having a ticket, who succeeds in safely boarding a moving train, is a passenger. *Sharer v. Paxson*, 171 Pa. 26.

And in *Murphy v. St. Louis, etc., R. Co.*, 43 Mo. App. 342, it was held that one boarding a train moving at the rate of four miles an hour, at a flag station, on the invitation of the conductor, was a passenger.

**Attempt to Board Moving Street Car Does Create the Relation.**—The relation of passenger and carrier can only be created by contract between the parties, express or implied. The mere attempt, therefore, to board a moving street car by a person who has not indicated his intention to do so in time to enable the persons in charge of the car to stop it at a proper place, does not create the relation of passenger and carrier. *Schepers v. Union Depot R. Co. (Mo.)*, 2 Am. & Eng. R. Cas., N. S., 9.

**Relation Not Constituted Where Those in Charge of Street Car Pay No Attention to Signals of Person to Board It.**—Where the persons in charge of a street-railway car neglect to pay attention to the signals of one wishing to board the car, the act of such intending passenger in attempting to get on the car while it is in motion will not of itself constitute him a passenger. *Schepers v. Union Depot R. Co. (Mo.)*, 2 Am. & Eng. R. Cas., N. S., 9.

**Waiver of Rule Forbidding Passengers to Get on or off Moving Cars.**—Where the rule of a street car company states that passengers "will not be allowed" to get on or off the cars while in motion, its enforcement may be waived. If a passenger is invited to get on a moving car he is a passenger, and the question whether he was invited or not is for the jury. *North Chicago St. R. Co. v. Williams*, 140 Ill. 275, 52 Am. & Eng. R. Cas. 522.

**On Wrong Train.**—A person who, by mistake, gets on a different train from the one he intended taking passage on is a passenger on the train he boards, and the relation of passenger and carrier exists between him and the company. *Columbus C. & I. C. R. Co. v. Powell*, 40 Ind. 37;

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*Arnold v. Pennsylvania R. Co. (Pa.)*, 28 Am. & Eng. R. Cas. 189; *International & G. N. R. Co. v. Gilbert*, 22 Am. & Eng. R. Cas. 405, 64 Tex. 536; *Cincinnati, H. & I. R. Co. v. Carper*, 31 Am. & Eng. R. Cas. 36, 112 Ind. 26, 11 West. Rep. 223, 13 N. E. Rep. 122, 14 N. E. Rep. 352.

Where it appears that the plaintiff, having a pass over defendant's railway to Troy, hearing the call "All out for Troy," got on the train which moved in the opposite direction to a water-tank for water for the engine, and was injured before the train returned to the station, the relation which plaintiff occupied to the railroad, whether as passenger or trespasser, will depend on his reasonable belief that the train was about to depart for Troy, justified by some conduct on the part of defendant's officers or servants having control of the movements of the train. *Brown v. Scarboro*, 58 Am. & Eng. R. Cas. 364, 97 Ala. 316, 12 So. Rep. 289.

When a passenger purchases a railroad ticket, no irrebuttable presumption arises that he is informed as to the rules and regulations of the company prohibiting the use of such tickets on certain trains, when no such prohibition appears on its face. If, in such case, the passenger without knowledge of such regulation, take a passage upon a prohibited train, he cannot be treated as a trespasser, and although he has no right to passage cannot be expelled from the train as a trespasser, but must be treated as a passenger who by mistake has got upon a train on which, by his contract, he is not entitled to travel. *Lake Shore & M. S. R. Co. v. Rosenzweig (Pa.)*, 26 Am. & Eng. R. Cas. 489.

**Riding on Special Train by Permission of Conductor, without Paying Fare.**—A passenger allowed to ride on a special train, who has no notice of any want of authority to grant the permission, whether he pays fare or not, in the absence of collusion between him and the conductor to defraud the company of its fare, becomes a passenger, and, as such, is entitled to have the train on which he travels managed with the care that is due from a common carrier to passengers on a train of that character. *Wagner v. Missouri Pac. R. Co.*, 97 Mo. 512, 3 L. R. A. 156, 10 S. W. Rep. 486.

And a person who enters the saloon car of a freight railway train, and when the train starts, without being requested or directed to leave, remains there as a passenger, contrary to the rules of the company, but with the knowledge of the conductor, who receives from him the usual fare of a first-class passenger, is entitled to the rights of a passenger. *Dunn v. Grand Trunk R. Co.*, 58 Me. 187.

**Reception of Persons as Passengers by Conductor of Construction Train.**—As the conductor in charge of a construction train is the representative of the railroad company, and the manager of the train, his action in receiving passengers upon such train and collecting fare from them, ordinarily entitles them to the rights of passengers, and to such care and attention as can be reasonably given to them upon such a train. And the fact that the conductor may have carried such passengers without authority from the company, and contrary to instructions given him, will not relieve the company from liability for the failure to exercise due care towards those so received as passengers, unless they knew they were riding in violation of the rules of the company, and had willfully joined with the conductor in committing a wrong against



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the company. *Chicago, K. W. & R. Co. v. Frazer* (Kan.), 2 Am. & Eng. R. Cas., N. S., 206.

**On Wrong Train through Negligence—Cancellation of Ticket.**—The mere purchase of a ticket to a certain station does not create a contract on the part of the railroad company to carry the passenger on a train that does not stop at that station, and it may be negligence for the passenger to get on such train; yet if he does so, taking and punching his ticket by the conductor, after examining it, so that he cannot ride on another train, is sufficient acceptance of him as a passenger. *Schurr v. Houston*, 10 N. Y. S. R. 262.

But where a person who has purchased a railroad ticket for a designated station without making any inquiries or ascertaining what trains stop at the station to which he desires to go, subsequently takes his seat in a train which does not stop at the station for which he has a ticket, and such person refuses to pay his fare on the demand of the conductor to the next station at which the train is to stop, and also refuses to leave the train when requested to do so by the conductor after he has stopped it at a suitable place for that purpose, such person is a trespasser. *Atchison, T. & S. F. R. Co. v. Gantz* (Kan.), 34 Am. & Eng. R. Cas. 290.

**Train Intended for a Certain Class.**—So, one boarding a train with knowledge that it is intended for a certain class of persons to which he does not belong, is not a passenger. *Fitzgibbon v. Chicago & N. W. Ry. Co.* (Iowa), 14 Am. & Eng. R. Cas., N. S., 270, and *foot-note*.

**Person Attempting to Board Train Stopping Only for the Purpose of Leaving Passengers.**—A person attempting to board a train which was accustomed to stop at a station for the purpose of leaving passengers and not for the purpose of receiving passengers, who fails to make known his intention to board the train, is not a passenger so as to entitle him to recover for injuries sustained while attempting to get on board. *Jones v. Boston & M. R. R. Co.* (Mass.), 39 N. E. Rep. 119; *Merrill v. Railroad Co.*, 139 Mass. 238; *Dewire v. Railroad Co.*, 148 Mass. 343, 37 Am. & Eng. R. Cas. 57; *Webster v. Railroad Co.*, 161 Mass. 298, 58 Am. & Eng. R. Cas. 1.

And a passenger has no right on a train which, under the rules of the company, does not stop at the station for which he purchased a ticket. *Chicago, St. L. & P. R. Co. v. Bills*, 104 Ind. 13, 3 N. E. Rep. 611.

**Person on Freight Train in Violation of Rule.**—A regulation disallowing passengers on a freight train is a reasonable one, and the conductor of such a train, in the absence of assumed or proven authority, is not to be presumed as authorized to disregard it; and if, instead of assuming such authority, the conductor in fact tells a person desiring to take passage that he did not have the authority, and is then induced by such person to take him on the train in violation of such rule, and disregard of his obligations to the company, such person does not thereby become a passenger, or entitled to the rights of a passenger, but is a trespasser, and takes the risk of injury as such. *Louisville & N. R. Co. v. Bailey* (Tenn.), 29 S. W. Rep. 367. In this case the court said in its opinion: "The rule in this, as in many other states, is that if one take passage on a train or in a car not provided for passengers, without being advised that he is not permitted to ride on such train or car, he may

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recover for injuries sustained as a passenger while so riding. *Washburn v. Railroad Co.*, 3 Head 638. But the rule is different if he has no right so to believe, or is informed to the contrary. *Railroad Co. v. Meacham*, 91 Tenn. 428; *Trottinger v. Railroad Co.*, 11 Lea 533, 13 Am. & Eng. R. Cas. 49; *Railroad Co. v. Brooks*, 81 Ill. 245; *Railroad Co. v. Moore*, 49 Tex. 31; *Railway Co. v. Campbell*, 76 Tex. 174, 41 Am. & Eng. R. Cas. 100; *McVeety v. Railway Co.*, 45 Minn. 268, 47 Am. & Eng. R. Cas. 471."

**When Relation of Carrier and Passenger Terminates.**—See *Brunswick & W. R. Co. v. Moore* (Ga.), 12 Am. & Eng. R. Cas., N. S., 84, and extensive note, 84 *et seq.*

**Same—Passenger Alighting at Intermediate Station.**—See *Missouri, etc., Ry. Co. of Texas v. Overfield* (C. C. A.), 12 Am. & Eng. R. Cas., N. S., 207, and foot-note.

**Same—Person Crossing Intervening Tracks to Platform after Alighting from Train.**—See *Chesapeake & O. Ry. Co. v. King* (C. C. A.), 17 Am. & Eng. R. Cas., N. S., 167, and foot-note.

**Same—Leaving Train before Reaching Station for the Purpose of Walking Home.**—In *Buckley v. Old Colony R. R. Co.* (Mass., March 30, 1894), 36 N. E. Rep. 583, it was held that one who before reaching the station to which his ticket entitles him to go, leaves the train at a place not designed for the discharge of passengers for the sole purpose of continuing his homeward journey on foot, thereby terminates his relation to the company as a passenger. *Distinguishing Boss v. Railroad Co.*, 15 K. I. 149.

**Same—Working on Train.**—When a passenger on a railroad train at the request of a fireman undertakes to clean the engine headlight he does not lose the character of a passenger. *Brown v. Scarboro*, 97 Ala. 316, 58 Am. & Eng. R. Cas. 364.

**When Presumption That One Was a Passenger Arises.**—See *Isaman v. South Carolina & G. R. Co.* (S. Car.), 11 Am. & Eng. R. Cas., N. S., 219, and note, 227 *et seq.*

**When Presumption That One Was a Passenger Does Not Arise.**—See note, 11 Am. & Eng. R. Cas., N. S., 228.

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v.

## HARBESON.

(Circuit Court of Appeals, Sixth Circuit, Nov. 7, 1900.)

[104 Fed. Rep. 737.]

**Master and Servant—Fellow Servants—Train Dispatcher and Trainmen.\***—A railroad train dispatcher is a vice principal, and not a fellow servant, in his relation to trainmen, and the master is liable for an

\*See *Missouri, etc., Ry. Co. v. Elliott* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 715, and foot-note, 716.

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injury to a trainman which is the proximate result of the negligence of the dispatcher in giving orders for the movement of trains.

**Same—Injury to Servant—Concurring Causes.**—A master is liable for an injury to a servant of which the negligence of a vice principal was a proximate contributing cause, although the negligence of a fellow servant was also contributory.

**Same—Question for Jury.**—A train dispatcher sent an order for the passing of two trains on a single-track railroad at a certain station, to be delivered to one of the trains at such station, in direct violation of a rule of the company which required such orders to be delivered to all trains at least one station from the point of meeting. A second rule required all trains, on approaching signal stations, to be under such control that they could be stopped before passing the signal board, if proper signal therefor was given. The regular train, which had not received the orders for meeting, could not be stopped by the engineer, after receiving the signal, until it had passed beyond the switch through which the opposing train was to enter, and a collision resulted, in which plaintiff's intestate, a fireman, was killed. *Held*, that the first rule must be regarded as prescribing an additional precaution deemed necessary by the company to insure greater vigilance and care on the part of engineers in approaching meeting stations, and that its violation by the train dispatcher could not be said, as matter of law, not to have been a proximate cause of the injury, even conceding that the collision would not have occurred but for the concurrent negligence of the engineer in failing to have his train under proper control, since such negligence may have been superinduced by his ignorance that he was to meet the other train.

In Error to the Circuit Court of the United States for the District of Kentucky.

C. B. Simrall, for plaintiff in error.

Alfred Mack, for defendant in error.

Before Lurton, Day, and Severens, Circuit Judges.

Lurton, Circuit Judge. This was an action in tort for the negligent killing of Frank J. Schlosser, the intestate of the defendant in error, while a fireman in the service of the plaintiff in error. There was a verdict and judgment for the defendant in error. The intestate was killed by a collision at night between two freight trains while serving as fireman upon one of them. The colliding trains were respectively known as Nos. 36 and 37. The collision occurred at Blanchett, Ky., a station on the line of railroad operated by plaintiff in error. Train No. 36 was a north-bound freight, and entitled to the right of track. Train No. 37 was a south-bound freight, and was a "double-header"; that is, it was pulled by two engines, Schlosser being the fireman on the second engine. The trains were opposing trains, and were being moved under telegraphic orders from the train dispatcher at Lexington, Ky., who purposed that they should meet and pass at Blanchett. The con-

tention of the plaintiff below was that the train dispatcher was guilty of negligence in sending a meeting order for these opposing trains which was not to be communicated to one of them (No. 36) until it should reach the meeting point, and that the collision occurred before No. 36 had received the order, and as a consequence of its failure to receive a meeting order before reaching the place of meeting. The insistence was that this method of giving a meeting order was in violation of rule No. 521, prescribed by the railroad company for the government of its train dispatcher and the movement of its trains, and that the rule thus prescribed was a reasonable rule, and its violation by the dispatcher negligence, for which the railway company was liable. Rule 521 was in these words:

"Meeting orders must not, under any circumstances, be sent for delivery to trains at the meeting point. There should always be at least one station between those at which opposing trains receive meeting orders."

The dispatch sent a meeting order in duplicate for trains Nos. 36 and 37, which was in these words:

"No. 36 will get this order at meeting point, and meet No. 37 at Blanchett. No. 37 and No. 32 will meet at Hinton."

This order was sent to, and received by, train No. 37 at Williamstown, a station about eight miles north of Blanchett. The same order was sent to No. 36 at Blanchett, the meeting point, but was not received until after the collision. The obvious purpose of this rule was to give to meeting trains their meeting orders at least one station before either should reach the meeting point. Such a rule was calculated to insure a mutual understanding between trains, and enable each to govern itself accordingly. The rule required that train No. 36 should receive its meeting order at least one station before reaching the meeting point at Blanchett. If it had done so, it would have known that it would meet No. 37 at that station, and come under urgent obligation to avoid passing that station so as to block the entrance of No. 37 into the switch just north of the station which it was the duty of No. 37 to take.

District Judge Barr construed the rule as we have interpreted it. There was no error in this. The jury was instructed that the question as to whether a violation of the rule, so interpreted, was negligence, was for the jury; the rule being only prima facie evidence of what would be due care.

They were also instructed that the train dispatcher was a vice principal, and not a fellow servant, and that the plaintiff in error was liable for the proximate consequences of the negligence of the dispatcher. There was no error in this. Railroad Co. v. Camp, 13 C. C. A. 233, 65 Fed. 952, 31 U. S. App. 213.

At the close of all the evidence the plaintiff in error asked for a peremptory instruction, which was denied. It is now urged that there was no evidence upon which the jury could reasonably find that the negligence of the plaintiff in error in

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the manner of giving the orders for these trains to meet at Blanchett was the proximate cause of the collision, and that the court erred in not so instructing the jury. The evidence did establish that a red signal light was showing as No. 36 approached Blanchett which could be seen by train No. 36 for a distance of about 18 telegraph poles. If this was not changed to white after the train whistled for the station, it signified, under the well-established rules of the company, that the train must be stopped before any part of it should pass the signal board, and that the conductor and engineer should then proceed to the telegraph office for orders. The rules required that signal stations should be approached with the train under such control as that it might be brought to a full stop if the red light was not changed to a white one after the train had called for the board. The evidence also established that the engineer saw this red signal light as soon as it could be seen, and that he at once whistled for the station. The red light not being at once changed to white, so as to authorize him to pass the station without stopping, he shut off steam, and endeavored to stop the train before passing the signal board. The speed of the train was at the moment not less than 25 miles per hour; the grade slightly descending; the train was unusually long and heavy; it did not succeed in stopping until the engine had passed about 300 feet north of the signal board, when, and as it stopped, it came into collision with train No. 37, which was approaching the station to take the siding in order that No. 36 might pass on the main track. The evidence also tended to show that if an effort had been made to get the train under control when the red signal light was first seen, instead of waiting to see whether it would be changed to a white light, it could have been stopped before passing the signal light, as required by the rule. The evidence showed that on this occasion the engineer of No. 36 made no effort to bring his train under control until he saw that the board was not changed to a white light in response to his station call, which was when he had run about eight or nine telegraph poles after first seeing the signal board and was within eight or nine poles of the board.

But there was also evidence that on this occasion the engineer commenced to stop at the place where engineers customarily and usually begin to stop when approaching Blanchett with a red light showing. It is now contended that, if the engineer on No. 36 had obeyed strictly the rule requiring him to approach every signal station with his train under such control as to enable him to stop if he does not receive a clear signal light after calling for the board, this collision would not have occurred, although the train dispatcher had not given him notice to meet No. 36 at Blanchett, and that this negligence of the engineer was the negligence of a fellow-servant of the intestate, and the sole proximate cause of the collision. The same contention is advanced as to negligence of engineer of

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No. 37, it being argued that that train approached Blanchett from the north with full knowledge that it would there meet No. 36, and that the evidence establishes that it did not approach the station under such control as required by the rule of the company, and that the negligence of the engineer of No. 37 in this respect was the proximate cause of the collision, and not the negligence of the train dispatcher. It is enough in respect to the point made on the negligence of the engineer of No. 37 to say that there was a decided conflict as to whether he did not use all proper precautions required by the rules and by his knowledge of the fact that he was there to meet No. 36. It was clearly a question for the jury as to whether he in any way contributed to the collision.

Returning to the negligence of the engineer on No. 36, it is well settled that he was the fellow-servant of the trainmen on No. 37. If his negligence was the sole proximate cause of the collision, there can be no recovery against the plaintiff in error. But, if his negligence be conceded as established by the undisputed evidence, still, if the negligence of the train dispatcher, who was a vice principal, contributed in producing the collision, the plaintiff in error is liable, although the negligence of a fellow-servant was also contributory. *Railroad Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266.

The case went to the jury upon the question as to whether the negligence of the train dispatcher, concurrently with the negligence of the engineer of No. 36, caused the collision, or whether the negligence of the train dispatcher proximately contributed thereto. The question of proximate negligence is ordinarily a question for the jury, upon all the facts and circumstances of the case. As said by the court in *Railway Co. v. Kellogg*, 94 U. S. 469, 474, 24 L. Ed. 259:

"It is not a question of science or legal knowledge. It is to be determined as a fact in view of the circumstances attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied at the other end; that force being the proximate cause of the movements, or as in the oft-cited case of the squib thrown in the market place. 2 W. Bl. 892."

It is altogether probable that, if the rules regulating the approach and stopping of trains at signal stations had been strictly observed, No. 36 would have been stopped before passing the entrance to the siding north of the signal board at Blanchett, and all evil consequences from the train dispatcher's negligence thereby avoided.

Same—Questions  
for Jury.

But can we say, as matter of law or undisputed fact, that the negligence of the latter did not co-operate to bring about the collision? The rule of the company requiring that meeting orders should be given to each train at least one station in advance of the meeting point was framed doubtless with a view

to secure greater vigilance and caution in approaching meeting points in consequence of this knowledge and mutual understanding of the meeting trains.

The rule is but supplementary to the rules governing the approach of all trains to telegraph signal stations. The latter rules apply regardless of the question as to whether it is a meeting point. The rule as to notice of meeting points may well be regarded as a wise precaution in addition to the rules governing the approach to and stopping at signal stations, especially when the road is a single-track road, as that operated by the plaintiff in error was. In view of the standard of due care enforced by the plaintiff in error, might not a jury well infer that, if the engineer of No. 36 had been warned that he would meet No. 37 at Blanchett, he would have exercised greater vigilance and care in bringing his train under control and in stopping it before passing the switch or siding, which he would then know the opposing train must endeavor to take in order to give him the right of track? The plaintiff in error did not regard the signal board order to stop as sufficiently guarding against the danger to opposing trains at meeting points. Why? The inquiry must be answered according to the deductions to be drawn from the common understanding of the probable effect in arousing a higher degree of vigilance and caution as a consequence of receiving a warning as to the meeting points of opposing trains on a single-track railroad. Did all the facts constitute a chain of events so connected as to make a natural whole, or was the negligence of the engineer of No. 36 a new and independent cause, wholly unaffected by the primary negligence of the train dispatcher? If the negligence of the engineer of No. 36 in failing to get his train under such control as to enable him to bring it to a full stop before passing the signal board was negligence wholly disconnected from the primary fault of the train dispatcher, it was an intermediate, independent, and efficient cause for the collision which would constitute the sole proximate cause of Schlosser's death. But if, on the other hand, the negligence of the engineer of No. 36 was in part superinduced by his ignorance that he was to meet No. 37 at Blanchett, the original fault of the train dispatcher may be considered as reaching to the effect and proximately contributing to it. The circumstances did not so indisputably demonstrate that the causal connection was not proximate as to justify the court in taking the case from the jury. *McDonald v. Railroad Co.*, 20 C. C. A. 332, 74 Fed. 104; *Telegraph Co. v. Zopfi*, 19 C. C. A. 605, 73 Fed. 609; *Railroad Co. v. Sutton*, 11 C. C. A. 251, 63 Fed. 394; *Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. The judgment is accordingly affirmed.

PHELPS

v.

CHICAGO & W. M. RY. CO.

(*Supreme Court of Michigan, Nov. 13, 1900.*)

[84 N. W. 66.]

**Injury to Servant—Obstructions near Track.\***—Defendant's brakeman was injured by a fish chute which abutted upon the main track and not within the yards of the defendant company. *Held*, that while brakemen and switchmen in making up trains must be on the lookout for such obstructions near a side track, yet where they abut upon the main track and not in yards where trains are usually made up, servants have a right to expect that they will not be placed so close to the track as to make them dangerous, and on these grounds judgment for plaintiff is affirmed.

On rehearing. Affirmed.

For former opinion, see 81 N. W. 101, 16 Am. & Eng. R. Cas., N. S., 302.

Long, J. A motion for rehearing has been granted in this case; and, upon further consideration, we are now satisfied that the fish chute complained of abuts upon a part of the main track, and not upon the side track, as held in the former opinion, and that such main track upon which the fish chute abuts is not within the yards of the defendant company. The rule is very different than where such obstruction abuts upon a side track. Such conveniences near side tracks, or abutting on them, are usually necessary for the conduct of railroad business, and, in making up trains, brakemen and switchmen must be on the lookout for them, while, where they abut on the main track, and not in yards where trains are usually made up, servants of railroads may expect that such obstacles will not be placed in so close proximity to the track as to make them dangerous. The plaintiff was not familiar with the surroundings, and had had no opportunity to make himself familiar with them. The rule might be different, had he been familiar with the position of the chute. For these reasons, the judgment must be affirmed. The other justices concurred.

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\*See *Keist v. Chicago G. W. Ry. Co.* (Iowa), 16 Am. & Eng. R. Cas., N. S., 297, and *foot-note*, 298.



## LOUISVILLE &amp; N. R. Co.

v.

SHEARER *et al.**(Court of Appeals of Kentucky, Nov. 27, 1900.)*

[59 S. W. 330.]

**Negligence—Pleading.**—A petition alleging that defendant committed certain acts, and that “by said carelessness and negligence and misconduct of defendant and its employees” plaintiff was injured, sufficiently alleges negligence.

**Frightening Horses—Negligence—Failure to Give Signal of Approach to Overhead Bridge—Question for Jury.**—Whether the failure to give notice of a train’s approach to an overhead bridge was negligence was a question for the jury where plaintiff, by reason of the omission, was driving across the bridge at the time the train passed under it, causing her horse to become frightened.

**Same—Same—Sounding Whistle under Bridge.\***—The blowing of the whistle of a train while the train was immediately under a bridge, over which plaintiff was driving, was negligence, unless there was some necessity for the whistle at that point.

**Separable Acts of Negligence.**—Where the petition alleged defendant’s negligent failure to give signal of a train’s approach to an overhead bridge and the negligent sounding of the whistle immediately under the bridge the alleged acts of negligence were separable and plaintiff was entitled to recover upon proof of either.

Appeal from circuit court, Clark county.

“Not to be officially reported.”

Action by Jennie Shearer and her husband against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for plaintiffs, and defendant appeals. Affirmed.

Breckinridge & Shelby, for appellant.

L. Hathaway, for appellees.

Du Relle, J. Appellee recovered a judgment against appellant company for \$250 damages for injuries by her horse becoming frightened by appellant’s railroad train while she was driving over a bridge upon which a turnpike crosses appellant’s track. The first ground of reversal urged is that a demurrer should have been sustained to the petition. The pleading

\*See generally, monographic note, 5 Am. & Eng. R. Cas., N. S., 282 *et seq.*

## Louisville &amp; N. R. Co. v. Shearer

alleges: "That while plaintiff, Mrs. Jennie Shearer, was thus crossing, one of defendant's trains passed under said bridge; that said train approached said crossing under said bridge without giving any signal or warning whatever of its approach until it was under said bridge and said vehicle, when the employees of defendant in charge of said train caused the whistle to be sounded as said train was under said bridge, and as it passed out from under said bridge; that by said carelessness and negligence and misconduct of defendant and its employees said horse which was attached to said vehicle was badly frightened," etc. The point made is that the failure to give timely warning of the approach of the train, and the sounding of the whistle when the train was under the bridge, which are the facts relied on as showing negligence, are not averred to have been a negligent omission and a negligent act of appellant; that the reference in the succeeding part of the sentence, averring that "by said carelessness, negligence, and misconduct of defendant" the injuries were caused, is not an avowal of negligence, but merely an assumption that the act and omission previously charged constituted negligence, and that the act and omission charged do not, nor does either of them, constitute negligence per se. This is not artistic pleading, but we think the language used cannot mean anything else than a charge that the act and omission complained of were negligence on the part of the appellant, and caused the injury to appellee. Moreover, the answer denied that the horse of appellee "was frightened, became unmanageable, jumped, or ran by reason of the alleged carelessness, negligence, or misconduct of the defendant and its employees," thus joining issue upon this question, which was afterwards submitted to the jury by the instructions. It is insisted that the mere failure to give notice of the train's approach to an overhead bridge, and the mere act of sounding the whistle under the bridge, did not constitute negligence per se; that, under all the circumstances of the case, considering the topography and actual conditions existing at the time, there was nothing from which the jury had the right to draw the inference of negligence, and therefore that the peremptory instruction asked for by appellant should have been given. It is shown that for a considerable distance before reaching the bridge over which appellee was traveling the turnpike ran almost parallel with the railroad track, and that the land over which the turnpike ran was considerably elevated above the level of the track, which for upwards of a hundred yards before reaching the bridge was in a cut so deep that only the tops of the cars were visible from the road; and there was evidence tending to show that giving a signal of the approach of the train would cause more danger of frightening horses upon the turnpike than would be caused by the mere noise of the train passing under the bridge without warning. In *Rupard v. Railroad Co.* (Ky. App.) 11 S. W. 70, 7 L. R. A. 316, the railroad crossed the public high-

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way upon a trestle, and this court, in an opinion by Judge Bennett, appears to have taken the view that “\* \* \* where the train crosses a public highway on a trestle, and in view, as above intimated, of the frequency of travel on horse back or by driving on the public highway, and the facility of seeing the train, as it approaches the crossing, in time to prevent injury by scaring the horse, the danger of catching the traveler unawares and frightening the horse that he is riding or driving may be reasonably apprehended, it is its duty to give some timely warning of its approach to the crossing; and the question as to whether or not the failure to give such warning is negligence should be left to the jury.” In the case at bar there was evidence on behalf of appellant directed to the point that it was not negligence to omit giving a signal of approach to the crossing at this particular point. Upon the other hand was the fact that, by reason of the omission, appellee was driving across the bridge at the time the train passed under it. Under the opinion referred to—and, indeed, as an original proposition, without reference to that opinion—we have reached the conclusion that the question whether the omission to give warning of the approach to the overhead crossing was negligence was a question for the jury. It was submitted to the jury in language most clear and apt, the instruction being that, “if the jury believes from the evidence that the giving of a signal or warning of the approach of the train to the bridge was reasonably necessary for the safety of persons who might be using the highway, then such failure, if any, constitutes negligence.” The converse of the proposition was given in instruction No. 5, which reads: “The jury are instructed that the defendant was under no duty to give a signal or warning of its approach to the bridge unless the same was reasonably necessary for the safety of persons who might be using the highway, and that the omission of defendant on the occasion in question to give such signal or warning did not constitute negligence unless the jury believes from all the evidence in the case that such signal or warning was reasonably necessary for said purpose.” The appellee testified that the whistle was blown while the train was immediately under the bridge over which her vehicle was passing. The evidence of two other witnesses seems to support her statement upon this point, though the fact is not distinctly stated by them. This evidence, in the absence of testimony showing some necessity for the whistle at that point, would make out a case of negligence. The trainmen testified, in substance, that the whistle was not sounded until the engine had passed the bridge some 200 yards, and then in response to a caution signal given with a green flag, which it was the duty of the engineer to acknowledge and give notice of to the trainmen by sounding the whistle as soon as he saw it. Upon the question of negligence in sounding the whistle, the jury were instructed: “(3) If the jury believes from the evidence that the sounding of the

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whistle while the train was passing under the bridge was unnecessary, and dangerous to travelers passing over the bridge, then such act, if done by the defendant, constitutes negligence, unless done under circumstances stated in fourth instruction. (4) The jury are instructed that it was the paramount duty of those in charge of defendant's train to look out for the safety of said train and those upon it; and that, if they believe from all the evidence that when the engineer did blow the whistle in question it was done in acknowledgment of a caution signal which he then saw in front, and that such acknowledgment was for the purpose of notifying the other trainmen to so regulate the movement of the train as to make it safe for the persons and property in their charge, then the blowing of said whistle was not negligence." These instructions, we think, correctly and fully present the law applicable to this question under the circumstances of this case.

It is further urged that the court construed the petition as charging two distinct grounds of negligence, proof of either of which would warrant a recovery: First, negligent failure to give signal of the train's approach; and, second, negligent sounding of the whistle,—but that the petition must be construed as charging one negligent state of fact, and that the court should have required the jury, in order to authorize a recovery, to believe not only that there was a negligent failure to signal the approach of the train to the bridge, but a negligent sounding of the whistle while passing under it. We are referred to no authority upon this proposition, and we cannot recall a case in which, where a number of separable acts of negligence were charged in the petition, as in this case, the jury has been required to believe all of them in order to find a verdict of recovery. The uniform practice has been to instruct the jury upon each separable act of negligence charged in the petition upon which sufficient evidence has been introduced to justify a finding by the jury. We think such evidence is presented in this record, and, whether or not we agree with the verdict of the jury, it is certainly not palpably against the weight of the testimony. The judgment is affirmed.

## ALABAMA &amp; V. RY. CO.

v.

## BARRETT.

*(Supreme Court of Mississippi, Oct. 29, 1900.)*

[28 South. 820.]

**Loss by Fire—Circumstantial Evidence.\***—The fact that a fire was negligently caused by sparks from a locomotive, may be established by circumstantial evidence.

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\*See monographic note, 15 Am. & Eng. R. Cas., N. S., 495 *et seq.*

## Alabama &amp; V. Ry. Co. v. Barrett

Same—Prima Facie Case.—Burden of Proof.\*—Proof of such a fire and that damages were the natural and direct consequence of such negligence make out a *prima facie* case.

Same—Proximate Cause.\*—Although the property destroyed by such a fire did not adjoin the railway but was only reached by the fire burning its way across land of another, the owner of such property may recover for the loss, and defendant may not escape liability on the ground that its negligence was not the proximate cause of the loss.

Appeal from circuit court, Hinds county; Robert Powell, Judge.

“To be officially reported.”

Action by Mrs. Dorsey Barrett against the Alabama & Vicksburg Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Plaintiff sued the defendant below to recover of it damages for the burning over certain lands and the destruction of trees, grass, fences, etc., by fire, which plaintiff alleged, in her declaration, was negligently set out or permitted to start from sparks from a passing train on defendant's railway track. The lands the burning over of which is complained of do not adjoin the railway track or its right of way, but are separated from the right of way by the lands of others. The evidence in the case shows that the fire started near the edge of the right of way, and was discovered soon after the passage of one of defendant's trains, and that it burned over the adjoining lands, and reached plaintiff's lands. A plea of the general issue was filed by defendant, and at the trial the defense was made that the cause was too remote. A trial by jury was had, and resulted in verdict and judgment for plaintiff.

McWillie & Thompson, for appellant.

Williamson, Wells & Groom, for appellee.

Whitefield, C. J. There is no more reason why circumstantial evidence should not be sufficient to establish the fact that a fire was caused by sparks from a railroad locomotive, and that it was so caused negligently, than that it should not be sufficient to establish any other fact susceptible of proof in that way. The damages were the natural and direct consequences of the negligent act of the defendant in setting the fire. This court has held that proof of such fire and damage from it makes out a *prima facie* case. Louisville, N. O. & T. Ry. Co. v. Natchez, J. & C. R. Co., 67 Miss. 399, 7 South. 350. The defendant did not meet this burden of explanation and exculpation. This court is also committed to the doctrine that the owner of property destroyed by such a fire, though

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\*See monographic note, 15 Am. & Eng. R. Cas., N. S., 495 *et seq.*

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his property be not on land adjoining the railway, and is only reached by the fire after it has burned its way across the land or buildings of another, can recover for such loss against the railroad company (*Tribette v. Railroad Co.*, 71 Miss. 212, 13 South. 899); and it is the well-settled doctrine, according to the overwhelming weight of modern authority. Among many cases, see *Railroad Co. v. Williams*, 131 Ind. 30, 30 N. E. 696; *Poeppers v. Railroad Co.*, 67 Mo. 715. We have carefully read the opinion of Haight, J., in *Hoffman v. King*, 160 N. Y. 618, 55 N. E. 401, 46 L. R. A. 672, as well as the opinion of the two dissenting justices, and regard the dissenting opinion as much the more accurate statement of the law. In that case the fire had burned two days, and passed over more than two miles of country, before reaching the plaintiff's land. We do not mention these facts, however, as determinative; for, in the true logical view, neither time nor distance nor both are conclusive of the remoteness of the damages, but are proper elements to be looked to, in the particular circumstances of each case, in arriving at a conclusion as to whether the damages are, in any given case, the proximate or remote consequences of the defendant's act. Affirmed.

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JOHN M. WHEELER *et al.*, Plffs. in Err.,

v.

NEW YORK, NEW HAVEN, &amp; HARTFORD RAILROAD COMPANY.

*(Submitted May 14, 1900. Decided May 28, 1900.)*

[20 Sup. Ct. Rep. 949.]

**Error to State Court—Federal Question—Constitutionality of Taking of Land, to Abolish Grade Crossings—Due Process of Law.**—A claim that property is taken without due process of law when condemned under a special statute for the abolition of grade crossings, because the act authorizes an increase in the number of tracts, and requires the city to pay one sixth of the expense in violation of the said constitution which prohibits donations by a city to a railroad corporation, raises a Federal question for the purpose of a writ of error from the Supreme Court of the United States to a state court.

**Same—Same—Same—Same.**—The condemnation of property under a special statute for the abolition of grade crossings is not a taking of the property of the owners, whether as property owners or as taxpayers, without due process of law, by reason of the fact that the statute authorizes an increase in the number of tracts, and provides for payment of part of the expense by the city in which the property is situated, whether the provision for payment by the city is valid under the state constitution or not, since the condemnation of the property and the apportionment of the cost are distinct and separable portions of the statute.

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Error by defendants to the Supreme Court of Errors of the State of Connecticut. Affirmed.

See same case below, 70 Con. 326, 39 Atl. 443.

Statement by Mr. Justice Brown:

This was a motion to dismiss the writ of error, and in default thereof to affirm the judgment of the supreme court of errors of Connecticut.

The case originated in an application by the railroad company to the judge of the superior court to appoint appraisers to estimate the damages that might arise to the plaintiffs in error from the taking of certain real estate in the city of Bridgeport, for the purpose of carrying out an agreement between the railroad company and the city of Bridgeport for the abolition of grade crossings. This agreement, which was entered into under the provisions of an act of the general assembly, "providing for the abolition of grade crossings in Bridgeport," provided the manner, plans, method, and time in which the grade crossings should be abolished, and the proportion of the cost thereof to be borne by the city of Bridgeport and the railroad company—the proportion of such cost to be paid by the city being one sixth and that by the railroad company five sixths, provided the total cost to be paid by the city should not exceed the sum of \$400,000.

A demurrer to the application of the railroad company having been overruled, and a special defense in the answer having been stricken out as irrelevant and impertinent, an order was made appointing the appraisers. An appeal was taken to the supreme court of errors, which affirmed the judgment of the judge of the superior court, and defendant sued out this writ of error, which defendant in error moves to dismiss for want of jurisdiction, or to affirm upon the ground that the question upon which the jurisdiction depends is frivolous.

Messrs. R. E. DeForest and George P. Carroll for plaintiff in error.

Mr. Wm. D. Bishop, Jr., for defendant in error.

Mr. Justice Brown delivered the opinion of the court:

Plaintiffs assign as error that, in view of the fact that, by the agreement between the city and the railroad company, it was provided that the city should pay one sixth of the entire cost of the land required for the construction of a four-track road, as well as of all damages resulting from the changes of grade, there would be a reimbursement to the company for expenses in doing work and acquiring land not necessary or germane to the work of eliminating crossings at grade of the two present main tracks over the highways; and that, under these circumstances, the condemnation of defendants' property will be in furtherance of a scheme whereby the city of

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Bridgeport will contribute and donate to such company the credit, money, and property of the city, and of its property owners and taxpayers, in aid of the railroad company, contrary to the provisions of twenty-fifth amendment to the Constitution of the state of Connecticut, and the taking and condemnation of said Wheeler and Howes' said property will be a taking thereof without due process of law, etc.

1. We cannot say that there is no Federal question in this case. In their demurrer to the application of the railroad

Error to State  
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Question—Constitutionality of  
Taking of Land,  
to Abolish Grade  
Crossings—Due  
Process of Law.

company plaintiffs in error relied upon the unconstitutionality of this special act of the Connecticut legislature as contravening the twenty-fifth amendment to the Constitution of the state, and the Fourteenth Amendment of the Federal Constitution. The amendment to the state Con-

stitution provides as follows: "That no county, city, town, borough, or other municipality shall ever subscribe to the capital stock of any railroad corporation, or become a purchaser of the bonds, or make donation to, or loan its credit, directly or indirectly, in aid of, any such corporation."

The claim was, not that it was unconstitutional for the city of Bridgeport to pay for a part of the work for grade crossing elimination, but that the pay for work for the benefit of the company, in the construction of a four-track road, which was not necessary or germane to the work of grade crossing elimination, would be contrary to the above amendment to the state Constitution; and therefore that, as the land of Wheeler and Howes was to be taken to carry out a part of the project, to be paid for in part by the city, not necessary or germane to the work of grade crossing elimination, their property would be taken without due process of law. The substance of the defense seems to have been that the land was not taken solely for the purpose of abolishing grade crossings, but also for the purpose of laying two extra tracks, and making the road through the city of Bridgeport a four-track road instead of an ordinary double track. It seems that the railroad company had laid a complete four-track road all the way from New York to New Haven, except in that section which lay in the city of Bridgeport—a distance of more than 4 miles, and crossing at grade twenty-four streets, some of them the most frequented in the whole city. There is no doubt that the special act did authorize an increase in the number of tracks, and there was some reason for saying that in requiring the city to pay one sixth of the expenses incurred for this purpose, it was making a donation in aid of the railroad company in violation of the twenty-fifth amendment to the state Constitution, and as Wheeler and Howes were property owners and taxpayers of the city, they were incidentally affected by this, and therefore their lands were illegally taken.

2. But, assuming that there was color for the motion to dismiss, we are clearly of the opinion that the decree of the



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supreme court of error should be affirmed. That court had already decided, not only that the legislature might compel the removal of grade crossings and the payment of the expenses therefor, either by the railroad company or by the city, or by both (*Woodruff v. Catlin*, 54 Conn. 277, 6 Atl. 849, a case arising under a former act), and that a statute compelling the removal of grade crossings, as well as imposing upon the railroad the entire expense of the change of grade, was constitutional (*New York & N. E. R. Co.'s Appeal*, 58 Conn. 532, 20 Atl. 670; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269, 14 Sup. Ct. Rep. 437); but the very act in question in this case has also been held to be constitutional. *Mooney v. Clark*, 69 Conn. 241, 37 Atl. 506, 1080. That court also held in this case that, whether the land be taken only for the purpose of abolishing grade crossings or to straighten its line and construct additional tracks, the taking is in either case for railroad purposes and for a public use. It also held that the right of the railroad company to condemn defendants' property did not depend upon the validity of any part of the special act of 1895, since by the resolution of the board of directors of the company in July, 1896, and by the approval of the commissioners in June, 1897, both of which were alleged in the application, the railroad company was entitled under section 3461 of the General Statutes to take the land for the uses named in the resolution.

The plaintiffs in error contended before the supreme court of errors, as they contend here, that the agreement and order made in pursuance thereof, imposing upon the city a proportion of the expense of constructing the two additional elevated tracks, not necessary to the work of eliminating grade crossings, violated the state Constitution as well as the Constitution of the United States. "But," said the court, "if the railroad company desires to take this property as one step in carrying out the proposed plan, the defendants cannot prevent it upon the ground that the company may not afterwards be able to obtain reimbursement from the city. The ability of the defendants to obtain payment of their damages does not depend upon the right of the railroad company to collect a part of it from the city. Before taking the land the company must compensate the defendants." It was further said that, even if the employment of appraisers had established the liability of the city to pay a proportion of the expense of laying the additional tracks, such a defense was not open to the defendants, because they had not alleged that they were taxpayers or had any right or authority to represent the city in such proceedings, or that they will be injured in any respect from the payment by the city of its part of the expense of the work as fixed by the agreement and order. "But," says the court, "the appointment of appraisers in this proceeding does not affect the question of the liability of the city to pay

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that part of the expense ordered by the commissioners. The right of the railroad company to have appraisers appointed and to take this property does not depend upon the obligation of the city to pay a one-sixth part of the expense of the whole, or of any portion of the work of this undertaking. The two purposes of the act of 1895 were: First, the removal of all existing grade crossings in Bridgeport, and the construction, in the most feasible manner, after considering the interest of the public, the rights, responsibilities, and duties of the railroad company and of the city, and the rights of other parties concerned, of a four-track railroad through the city, in such a way as to avoid crossing any highway at grade; and, second, a just apportionment of the cost among those who ought to bear the expense of performing the work in the manner determined. These two purposes are so far distinct and separable, and are so intended to be by the act, that neither the right of the railroad company to perform the work according to the plans approved by commissioners, nor the power of the commissioners to compel its performance, depends upon a previous apportionment of the expense between the parties who should bear it. Section 12, as we have already said, provides that if no agreement shall have been made as authorized by § 2, the commissioners, after the work shall have been completed, shall apportion the entire expense among the proper parties."

The court intimated no opinion as to whether the agreement and order fixing the proportionate part of the entire expense to be paid by the city was of doubtful validity. It thought the question was one which could not properly be raised in this proceeding.

The court held in substance (1) that the right to have appraisers appointed did not depend upon the obligation of the city to pay a part of the expense, and that defendants could not prevent a condemnation by showing that the company might not afterwards be able to obtain reimbursement from the city; and (2) that the defendants, not alleging that they were taxpayers, or specially interested, were not in a position to question the validity of the proceedings. If this be so, it requires no argument to show that they are not in a position to contend that their property has been taken without due process of law. If the court had gone farther, and held that the taking of defendants' property for the purpose, not only of abolishing grade crossings, but of enabling the railroad company to lay additional tracks, was not a violation of the twenty-fifth amendment to the state Constitution, that would have been exclusively a local question, and would have involved no question of an unlawful taking of defendants' property within the Fourteenth Amendment.

If the fact that the city of Bridgeport contributed to the expense of abolishing grade crossings, and, incidentally thereto, to the construction of additional tracks, does no violence to

Pittsburgh, etc., Ry. Co. *v.* Stickley

the constitutional provision that no city shall make a donation in aid of a railroad corporation, as held by the supreme court of Connecticut, much less does it make a case of taking the property of petitioners, whether as property owners or as taxpayers, without due process of law.

The decree of the Supreme Court of Errors of the State of Connecticut is therefore affirmed.

Mr. Justice Gray did not sit in this case, and took no part in the decision.

## PITTSBURGH, C., C. &amp; ST. L. RY. CO.

*v.*

## STICKLEY.

*(Supreme Court of Indiana, Oct. 9, 1900.)*

[58 N. E. 192.]

**Adverse Possession—Sufficiency of Evidence.**—The evidence in an action to quiet title to certain land showed that M. conveyed a tract of land to defendant, and that a part of such land had been fenced in and used by the plaintiff and her grantors as part of a lot adjoining for 25 years, and that the plaintiff and her grantors owned and possessed the adjoining lot through a conveyance thereof from M. for 25 years. *Held*, that the court was justified in finding that M. deeded the adjoining lot 25 years before the action was commenced, and that plaintiff and her grantors other than M. built and maintained the fence, and hence such occupancy was adverse to defendant.

**Same—Same—Possession under a Claim.**—Plaintiff and her grantors built a fence on what they believed to be the true line of their lot, thereby inclosing a strip of land owned by defendant, which they used continuously for 25 years, and on which they erected a residence, when defendant built a fence on the true line. The evidence showed that the latter fence touched one corner of the house, was within two feet of a door on one side of the house, and shut off access from the house to the major part of the yard. *Held*, that the evidence warranted a finding that plaintiff and her grantors claimed to own to the fence they erected.

**Same—Land Owned by Railroad.**—A railroad is not a public highway, so as to preclude a party from acquiring title to land owned by a railway company by adverse possession, since such company holds and uses its property for the benefit of its stockholders, and not for the public.

**Same—Same—Right of Way—Exclusive Use—Right Must Be Asserted—Presumption of Grant.**—Though a railway company is authorized to take title to land for right of way in fee, the right to the exclusive use of such land must be asserted, and hence, where a party occupies railway lands adversely for 20 years, a presumption of a grant is raised.

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\*See notes at end of case.

Pittsburgh, etc., Ry. Co. v. Stickley

Appeal from circuit court, Randolph county; A. O. Marsh, Judge.

Action by Nancy E. Stickley against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment in favor of the plaintiff, defendant appeals. Affirmed.

N. O. G. E. Ross, for appellant.

Engle & Parry, for appellee.

Baker, C. J. Action by appellee in ejectment. Appellant filed a general denial. The court found generally for appellee, and entered judgment accordingly. Appellant claims that its motion for a new trial should have been sustained on the ground that the finding is not sustained by sufficient evidence. The case was submitted to the court upon an agreed statement of facts. The statement shows that in 1866 Sylvester Miller conveyed to the railway company certain described lands. This land the company intended to use for depot purposes, but has not done so. It adjoins the north side of the right of way. In the year —, Miller platted a tract next north of the railroad lands. The statement proceeds: "That the plaintiff and her grantors have been the owners and in possession of lot No. 13, in said addition, through a conveyance thereof from said Sylvester Miller, for 25 years; that the south line of said lot 13 is the north line of said strip so conveyed by said Miller to said railway company; that the plaintiff and her grantors, believing that the line of said lot 13 was several feet south of the true line, built a fence which extended the east line of said lot 18½ feet and the west line 13 feet onto said strip so conveyed to said railway company, treating and believing the location of said fence to be the true line, and have had that much of said strip so fenced in, and have continuously used and occupied the same for more than 20 years last past next before the commencement of the action, receiving the rents and profits therefrom; that (a few days before the filing of the complaint) the railway company tore down and removed the fence so built and maintained by the plaintiff and her grantors on said strip, and built a fence on the true line between said lot 13 and said strip, thus cutting her off from and depriving her of the use and possession of said strip so fenced in, held and used by her and her grantors for 25 years."

Appellant's first argument is this, in substance: The evidence shows that "the plaintiff and her grantors" have occupied the parcel in controversy for 25 years. Sylvester Miller was one of plaintiff's grantors. The evidence fails to show that plaintiff and her grantors other than Miller occupied the parcel 20 years, the limitation period. Miller was also defendant's grantor. Therefore Miller's occupancy was not adverse to defendant's grant from him, and plaintiff's case was not sustained by the evidence. The premise is untrue that the evi-

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dence fails to show that plaintiff and her grantors other than Miller occupied the parcel 20 years. The evidence is that the parcel in controversy was fenced in, held, and used as part of lot 13 for 25 years, and that "plaintiff and her grantors" owned and possessed lot No. 13 "through a conveyance thereof from said Sylvester Miller for 25 years." The court was justified in believing that Miller's deed was made 25 years before this action was commenced, and that plaintiff and her grantors other than Miller built and maintained the fence.

It is next contended that appellee's possession of the parcel in question was not adverse, because she and her grantors never claimed to own any land beyond the true line of lot 13. If one intends to claim only to the true line, wherever that may be, manifestly his actual possession of what he disclaims to own is not adverse. *Silver Creek Cement Corp. v. Union Line & Cement Co.*, 138 Ind. 297, 35 N. E. 125, 37 N. E. 721. In the present case there was evidence to support a finding that appellee was not merely claiming to the fence if it should be found to be properly located, but was claiming the fence itself as the true boundary. For 25 years she and her grantors treated this fence as the true line. A part of the agreed statement is a map. This indicates that lot 13 is used for residence purposes. The house is suitably located if the fence built and maintained by appellee is taken as the true boundary. The fence erected by appellant touches the southwest corner of the house, is about four feet distant from the southeast corner, is within two feet of the door in the south side of the house, and cuts off access from the house, through any door now constructed, to the major part of the yard. This evidence warranted the court in believing that the occupants claimed to own the parcel in question. The possession for 25 years was continuous, open, peaceable, and under a claim, established by evidence, that the old fence was the true boundary,—a claim that appellant acquiesced in until it was too late to object. *Dyer v. Eldridge*, 136 Ind. 654, 36 N. E. 522; *Palmer v. Dosch*, 148 Ind. 10, 47 N. E. 176.

Appellant finally insists that land acquired by a railway company for right of way or station purposes cannot be taken from it by adverse possession, because a railroad is a public highway, and because the statute forbids interference with the company's exclusive use. A railway company owes certain duties to the public, but it holds and uses its property for the profit of its stockholders. The cases holding that the statute of limitation affords no defense to actions for encroachment upon streets and roads are inapplicable. A railroad is not a public highway in the sense that it belongs to the people. Railroad officers are not governmental agents whose laches create no bar. It is true that, for reasons of public policy, a judgment creditor will not be permitted to destroy a railroad by cutting it into parcels on execution sales, if the company resists. *Farmers' Loan & Trust Co. v. Canada & St. L.*

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Ry. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740. If a company voluntarily disable itself to perform its duties to the public, its charter may be forfeited. But there is no reason why a railway company should not be permitted to dispose of land it does not need in fulfilling its public duties, or why, if it disposes of land it does need, it should not be compelled, if it wishes to avoid a forfeiture of its charter, to reacquire the land by purchase or condemnation. It is true that the statute entitles a railway company to take land in fee, and forbids interference with the company's exclusive use. But the right to the exclusive use (which is an incident to every unqualified ownership) must be asserted. If one occupies adversely for 20 years land owned by a railway company, the statute of limitations should raise the presumption of a grant, for the company holds its lands for private gain, as a private proprietor. The state confers the power of eminent domain to enable railway companies to perform efficiently their duties as common carriers. But it is not apparent why the state should be concerned in preventing investors in railway stocks from sustaining loss through the negligence of their agents. *Railroad Co. v. Houghton*, 126 Ill. 233, 18 N. E. 301, 1 L. R. A. 213; *Same v. O'Connor*, 154 Ill. 550, 39 N. E. 563; *Same v. Moore*, 160 Ill. 9, 43 N. E. 364; *Donahue v. Railroad Co.*, 165 Ill. 640, 46 N. E. 714; *Railroad Co. v. Wakefield*, 173 Ill. 564, 50 N. E. 1002; *Matthews v. Railway Co.*, 110 Mich. 170, 67 N. W. 1111; *Bobbett v. Railway Co.*, 9 Q. B. Div. 424; *Norton v. Railway Co.*, 13 Ch. Div. 268; *Railway Co. v. Rousseau*, 17 Ont. App. 483. Judgment affirmed.

## NOTES.

**Title against Railroad Company by Adverse Possession.**—A title by adverse possession may be acquired as against a railway company to lands originally obtained by them for railway purposes. *Erie & Niagara R. Co. v. Rousseau*, 17 Ont. App. 483, 46 Am. & Eng. R. Cas., N. S., 539. In this case the court said in its opinion: "There is no evidence that the land in question is part of the permanent way (if that would have made any difference), or essential to the use and enjoyment of the railway as a public concern. Probably as matter of convenience or even profit it would be useful to the company, and they may have to acquire it again. But I see no reason for believing that they could not have sold it or leased it if they had desired to do so, and that being the case I think they were liable to lose it by the operation of the statute of limitations if they permitted or overlooked the defendants' occupation for the necessary period. The case really falls within the express words of the fourth section of the Real Property Limitation Act, R. S. O. (1887) chap. 111. There are no words in the defendants' charter to control the operation of that Act, and in *Bobbett v. South Eastern R. Co.*, 9 Q. B. D. 424, it was held by DENMAN, J., that the mere fact that land of a railway com-

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pany is required for the purposes of their undertaking, and is not superfluous land, does not prevent an occupier who has had exclusive adverse possession for twelve years from becoming thereby entitled to the land under the statute of limitations. No doubt the case did not in the end turn upon that point, but it was very carefully considered by the learned judge, and the plaintiffs have not in my opinion succeeded in showing that he was wrong. I refer also to *Norton v. London and North Western R. Co.*, 13 Ch. D. 268."

Certain land was granted to defendant by deed as a right of way, upon condition that it should construct its railroad within a reasonable time. Defendant allowed the land to be subsequently sold at a sheriff's sale; and its purchaser deeded it to plaintiff, who took immediate possession. Defendant, 34 years after the land had been granted to it as a right of way, and 16 years after plaintiff had been in possession of it as its owner, entered upon the land and began for the first time to construct its road. *Held*, that plaintiff had held the land by adverse possession for fifteen years prior to the trespass, and was entitled to maintain an action of trespass. *Pollock v. Maysville & B. S. R. Co. (Ky.)*, 14 Am. & Eng. R. Cas., N. S., 821.

For more than fifteen years a railway company had failed to use a strip of land which had been granted it as a part of its right of way, such land having been enclosed and used openly and continuously during that time for crops, pasturage and grass, without assent by the company, by one to whom it was conveyed by the original grantor. *Held*, that such grantee acquired title by adverse possession. *Mathews v. Lake Shore, etc., Ry. Co.*, 110 Mich. 170, 67 N. W. Rep. 1111.

The court, in delivering its opinion, said: "The precise question involved was recently determined by the supreme court of Illinois in the case of *Illinois Central R. Co. v. O'Connor*, 154 Ill. 550. The court says in that case:

'For more than 30 years it [the railroad company] abandoned all use of the land, fenced it out of its right of way, and allowed it to remain in the exclusive possession and use of the owner of the fee. When it desired to use it, it attempted to exclude the owner of the servient estate from the same. It is not denied that, if the controversy between these parties had been as to the ownership of the fee-simple title to the premises, plaintiff's possession would have been a complete bar; and we are at a loss to perceive how, under the facts of the case, it is less so as against the claim to a mere easement.'

"We think this decision is in harmony with the previous rulings of this court, in which it has been determined that the owner of abutting land may acquire title good as against the public, by an occupancy for the statutory period. See *Gregory v. Knight*, 50 Mich. 61; *Coleman v. Railroad Co.*, 64 Mich. 160; *City of Big Rapids v. Comstock*, 65 Mich. 78."

**Same—By Owner of Servient Estate.**—If the owner of the servient estate in land granted for a railroad right of way should fence a part of the right of way against the company itself, and claim to the knowledge of the railroad company a right to use it as his own, discharged of the servitude of the company, or under circumstances that necessarily gave the company notice of such claim, and should continue such possession

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for 10 years, the company would be barred of all right in the land so used. *Wilmot v. Yazoo & Val. R. Co. (Miss.)*, 19 Am. & Eng. R. Cas., N. S., 263.

**Same—Re-Entry.**—In 1853 a landowner gave a right of way over his land to a railway company by deed, the deed not identifying the land, the location of the right of way, or its extent, with any certainty. At the time of the giving of the deed the line had been located over such land, but the following year the work of construction was abandoned, and not resumed until 1871, when the line was relocated on such land, and stakes driven to mark the line, and in 1877 the company again took possession of the right of way by sending an agent to walk over it and restake it, but the work of constructing the railroad on such land was not undertaken until 1886. Five years after the date of the deed conveying such right of way, the land, including the right of way, was sold and the purchaser inclosed it, and he and his vendees used the right of way along with the rest of the land for agricultural purposes. *Held*, that the location of the right of way and the walking over the land by an agent of the company were not sufficient to have established a re-entry, as against the continued and actual adverse possession held by the vendees and those under whom they claimed, or to have broken the continuity of their adverse holding. *Maysville & B. S. R. Co. v. Holton (Ky.)*, 8 Am. & Eng. R. Cas., N. S., 336.

**Same—Location of Pottery Works on Railway Land by Mistake—Estoppel—Injunction.**—The proprietors of certain pottery works in erecting an addition to their plant located it by mistake on contiguous lands belonging to the defendant railway company. The company was aware that the erection was on its land. Several years later the plant was conveyed to the complainant company. The conveyance, however, did not include in its description the land on which the addition was built. In an action to restrain the railway company from entering on the land where the addition was erected and disturbing complainant's buildings, it was held, that while the possession of complainant and its grantors could not be joined to give title by adverse possession, yet upon the principle of estoppel, a preliminary injunction would be granted restraining defendant from interfering with complainant's buildings. *Fell & Throp Co. v. Pennsylvania R. Co.*, N. J. Sup. Ct., June 23, 1890.

**Same—Possession of the Proprietor of the Soil.**—Where land is conveyed to a railroad for its right of way, to be used for railroad purposes only, the proprietor of the soil still retains the fee of the land for any purpose not incompatible with the purposes of the railroad company; and, therefore, his possession of the land for agricultural purposes is not adverse to the company's right so long as the land is not required for railroad purposes. *Mobile & O. R. Co. v. Donovan (Tenn.)*, 18 Am. & Eng. R. Cas., N. S., 669. But see *note, Id.*, 680 *et seq.*

**Same—Use by Abutters of Right of Way Granted by Congress.**—In *Union Pac. R. Co. v. Kindred*, 43 Kan. 134, it was held that where abutting or adjoining landowners cultivate and occupy a part of the right of way granted by congress as an easement to a railway company, such possession must be regarded as permissive only, and not hostile or adverse, so as to confer title. The court said: "Although the abutting landowners have cultivated and inclosed part of the right of way



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granted by congress, this possession cannot be considered as hostile or adverse. It must be regarded as permissive only. If the fee of the land belongs to the United States, then the abutting landowners can acquire no title or claim by possession or limitation. *Smith v. Smith*, 34 Kan. 293. If the abutting landowners own the fee of the right of way, they may use the land in any way not inconsistent with the paramount rights of the railway company; but such use will not give them adverse possession, so as to confer title. *Kirk v. Smith*, 9 Wheat. (U. S.) 241; *McClelland v. Miller*, 28 Ohio St. 488; *Union Pac. R. Co. v. Harris*, 28 Kan. 206, 11 Am. & Eng. R. Cas. 431; *In re Railway Co.*, 20 Am. & Eng. R. Cas. 196; *Sapp v. Northern Cent. Co.*, 51 Md. 115."

## SOUTHERN RY. CO.

v.

STANDIFORD *et al.*(*Court of Appeals of Kentucky, Nov. 24, 1899.*)

[53 S. W. 668.]

**Railroad's Entry upon Land under Purchase from Life Tenant—Whether Remainder-Men Estopped.**—Where a railroad company has entered upon land and constructed its road under a parol purchase from a life tenant, the remainder-men, though they acquiesced in the building and operation of the road, are not estopped, after the death of the life tenant, to recover the land, if they did no act inducing the company to enter or occupy the premises.

**Railroads—Acquisition of Land by Dedication.\***—A railroad company cannot acquire title to land by dedication, as there cannot be a dedication of land to a private use.

**Recovery of Right of Way from Railroad—Institution of Condemnation Proceedings.**—Where a judgment against a railroad company for the recovery of land on which its road is constructed is affirmed on appeal, the company is entitled to a reasonable time after the order of affirmance becomes final within which to commence condemnation proceedings.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by Nettie Standiford and others against the Southern Railway Company to recover land. Judgment for plaintiffs, and defendant appeals. Affirmed.

Humphrey & Davie and E. P. Humphrey, for appellant.

St. John Boyle, John I. Calloway, and John C. Miller, for appellees.

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\*See note at end of case.

## Southern Ry. Co. v. Standiford

Hazelrigg, C. J. When sued in ejectment by the appellees for a certain strip of land on which it had constructed its railroad, the appellant company answered that prior to 1887, believing E. D. Standiford to have been the real owner, when he was in fact only tenant by the curtesy, its predecessor, the Southern Railroad Company, had purchased from him by verbal contract the strip of land in dispute, agreeing to pay therefor a certain sum in the stock of that company. Whether that company had paid the purchase price, the appellant did not know. It further answered that, relying on this contract with Standiford for the right of way, that company "did, at great expense, grade same, and lay down its tracks and rails, and connect same with its tracks at each end; all of which was done with the express consent and acquiescence of E. D. Standiford in his lifetime." It also averred that at the death of Standiford, in July, 1887, that company was in the open, notorious, and adverse possession of the land in dispute, claiming it as its own; and that each of the children of E. D. Standiford was, at the time of the death of their father, aware of the building, maintenance, and operation of the railroad from the time it was originally built, maintained, and operated, and knew, at the time of such death, that the company was claiming the strip as its own; and that they each acquiesced in the building, maintenance, and operation of the road, and made no objection thereto, and set up no claim to the land, and are therefore estopped by the grant, permission, and acquiescence of their father, who was to convey the land by deed of warranty, and also estopped by their own permission and acquiescence. It was, moreover, pleaded that in a suit for partition of the lands of E. D. Standiford among his heirs there was a map filed, showing the location of the road on the land, and the deeds of the heirs referred thereto, and thus the strip as located by the map was dedicated to public use. A demurrer was sustained to the appellant's pleas, and judgment finally rendered in appellees' favor for the land, but no writ of possession was to go until a given time, within which the appellant might proceed to condemn the land, as in the first instance its predecessors might have done.

We think this judgment is proper. The life tenant did nothing, and could do nothing, to estop the remainder-men; and, while there have been some expressions in one or more of the opinions of the court indicating that an action in ejectment will not lie in favor of one who, by his conduct, acquiescence, or fraud, induces a railway company to enter on his lands, and expend its money, still no such case is presented here. The averments of the answer are very indefinite and unsatisfactory on this behalf. It is true, the appellees were aware of the claim and occupancy of the company of the lands in dispute. But they are charged with no fraud or other act inducing the railway company to enter or occupy the premises. The entry was, possibly, not unlawful; indeed, it is

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alleged to have been in virtue of a verbal contract of purchase from the supposed owner. But, as there is no claim that the purchase price was paid, even the doctrine of "past performance," operating in some jurisdictions to relieve against the statute of frauds and perjuries, and entitling one who had entered under a verbal contract and expended money to specific performance, would not afford appellant any relief in the case. This doctrine, however, does not obtain in this state, and there is no ground whatever upon which the legal title of appellees can be said to have been divested, if, indeed, such divestiture can ever occur, save in the statutory method. *Railroad Co. v. Grady*, 6 Bush, 144. As to the effect of the map of the commissioners, it is well settled in this state that there is no such thing as a dedication of lands to a private use. *Railway Co. v. Stephens*, 96 Ky. 401, 29 S. W. 14. The appellant is entitled to a reasonable time after the order of affirmance here becomes final within which to commence condemnation proceedings, as indicated in the chancellor's judgment. The judgment is affirmed.

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NOTE.

**Whether Railroad May Acquire Land by Common-Law Dedication.**—A railroad corporation cannot acquire lands or an easement therein by common-law dedication, as such a dedication can be for public purposes only. *Lake Erie, etc., R. R. Co. v. Whitham*, 155 Ill. 514, 46 Am. St. Rep. 355, 28 L. R. A. 612. In this case the court, in delivering the opinion, said: "The case of *Morgan v. Chicago, etc., R. R. Co.*, 96 U. S. 716, upon which much reliance seems to be placed, will be found, on examination, to have been a case of a dedication or conveyance of certain lands to the railroad company by plat, and the question of a common-law dedication, and whether such dedication could be made to a railroad company, was not involved. That case, therefore, cannot be regarded as an authority upon the questions presented here. It should also be noticed that the suit was in equity—a forum where the doctrine of equitable estoppel has full play, and where there is always a strong indisposition to enforce stale claims, although they may not be barred by limitation, while this suit is in ejectment, where legal titles, only, are regarded."

Where the only methods by which railroad corporations are empowered to take land in a statute granting them certain general powers which are enumerated are by voluntary grant and donation, or by condemnation, a railroad company cannot hold land by dedication. *Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Marble et al.*, 112 Mich. 4. In this case it was said in the opinion: "The questions here presented arose in the case of *Watson v. Railway Co.*, 46 Minn. 321. It appeared in that case that a plat of the lands contained a strip across the plat, marked 'Reserved for right of way, line of S. M. R. R.' It was claimed upon the part of the railroad company that this showed an intent to dedicate the lands so marked for railroad purposes. It was

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held, however, that the effect of this was not to dedicate the land to the railroad company by the statutory dedication, and that the railroad company could not take title by common-law dedication. It was said by the court:

'It is argued that a railway company is a public or *quasi* public corporation; that its purposes and duties are public; that its use of land held and used by it for the purpose of its railroad is a public use, and that lands dedicated for that purpose are dedicated to the public for public use. From the arguments used, it might be inferred that the title of such a company to the lands held by it is merely nominal,—held by an agent for its principal, no rights or interests of its own being involved. Fortunately for such corporations, and for the public also, this is not the view the courts take of the relation between the corporation and the property held by it. The lands acquired by the corporation for the purpose of its enterprise are, so far as the right of property is concerned, private property. If purchased, the corporation pays for them; if taken in the exercise of the right of eminent domain, it pays the compensation. It is true they are charged with a public duty, which the corporation, in consideration of the rights and powers conferred on it by the state, assumes to perform, and which the state can compel it to perform. \* \* \* The corporation, for its own profit and advantage, accepts the franchises offered by the state, and assumes to perform the functions and duties required by the state, not with property furnished it by the state, but with its own property. The ownership of the property is private, though the use required to be made of it is public.'

"The same rules were laid down in Louisville, etc., R. Co. v. Stephens, 96 Ky. 401; Todd v. Railroad Co., 19 Ohio St. 514; Lake Erie, etc., R. Co. v. Whitham, 155 Ill. 514 (46 Am. St. Rep. 355)."

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WRIGHT

v.

## SOUTHERN RY. CO.

*(Supreme Court of North Carolina, Nov. 27, 1900.)*

[37 S. E. 221.]

**Derailement—Injury to Employee—Absence of Proper Appliances to Stop Train—Question for Jury.**—A freight train on which plaintiff's intestate was brakeman consisted of engine, caboose, and nine cars. The engine and four cars had air brakes and Janney couplers, the rest of the train having old style couplers and brakes. While going down grade at a speed of 18 miles an hour, a truck left the rails, and the train was ditched, and intestate killed. The train was ordinarily manned by two brakemen and a flagman, but at the time of the accident intestate supplied the place of the three. The evidence was conflicting as to how far the train ran after the trucks left the rails,—one witness putting it

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at 300 feet, another at from 700 to 1,000 feet. One of plaintiff's witnesses testified that in his opinion the air brakes were sufficient to control the train. *Held*, that the question as to whether the train was provided with proper appliances to stop the train, so as to prevent the derailment, should have been submitted to the jury.

**Same—Same—Defective Appliances—Question for Jury.**—It was error to charge the jury to find that there was no defective machinery, on the testimony of the conductor that he went along the side of the train, and looked under the cars, and saw no defects, as such fact should have been left to the determination of the jury, under all the circumstances of the case.

**Same—Same—Presumption of Negligence.\***—While a railroad company is not an insurer of the safety of its employees, a collision or derailment of a train, causing injury to an employee, raises a presumption of negligence on the part of the railroad company, and casts on it the burden of proving that it was not negligent, and this notwithstanding the injury might have been caused by the negligence of a fellow servant.

FAIRCLOTH, C. J., and FURCHES, J., dissenting.

Appeal from superior court, Rowan county; Timberlake, Judge.

Action for injuries to plaintiff's intestate by R. Lee Wright, administrator, against Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

L. S. Overman, R. Lee Wright, and A. C. Avery, for appellant.

A. H. Price, for appellee.

Clark, J. The plaintiff's intestate was killed in a railroad wreck. Sixty feet west of a cutting, at a curve, wheel prints on the cross-ties showed that a derailment had begun. Three hundred feet further on, according to one witness, and seven hundred to one thousand feet, according to another, the cars rolled down a high embankment, and the intestate, who was in the car next to the tender, was so injured that he died. The freight train, on which he was the sole brakeman, was running 18 miles an hour, and down grade. There were nine cars, besides caboose, engine, and tender. Eight cars rolled down the embankment and became kindling wood. Four cars had air brakes and Janney couplers; the others were old style. The engine had air brakes. The conductor of the train, who was summoned for the plaintiff, expressed the opinion that there was a sufficient number of air brakes to control the train. The plaintiff asked the court to charge: "The jury are the judges as to the distance within which the train might have been stopped, with such appliances as the law requires a railroad company to furnish, and it is the province of the jury to say in this case whether, if the defend-

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\*See *Ketterman v. Dry Fork R. Co.* (W. Va.), 19 Am. & Eng. R. Cas., N. S., 445, and *foot-note*, 446.

ant's train had been furnished with air brakes and improved couplers, the train might have been stopped in time to prevent the derailment. *Lloyd v. Railroad Co.*, 118 N. C. 1012, 1013, 24 S. E. 805." This the court refused to give, but charged the jury: "All the evidence tending to show that the engine and four cars had air brakes and Janney couplers, and that this number was sufficient to control a train of that size, you will not find defendant guilty of negligence in the second particular [i. e. failure to have air brakes]." This was directing a verdict, and was error. It is true the plaintiff had gone "into the enemy's camp," and gotten a witness who testified to his opinion that the brakes on the engine and four cars were "sufficient to control" a train consisting of nine cars and a caboose, besides engine and tender; but, on the other hand, there should have been left to the jury the fact that it did not control the train, and that after the first truck left the track at the curve the train ran 300 to 1,000 feet before the eight cars rolled down the embankment. If the opinion of one witness, that having proper appliances on four cars out of nine was sufficient, governs, then the function of the court, in holding that all cars must be so equipped, is evaded and set aside by the judgment of a railroad employee, and it is for the railroad, and neither for this court nor the jury, to decide what appliances are necessary. Besides, the jury were deprived, by the court's directing a verdict, of passing upon the question of fact whether these appliances were sufficient, when the accident itself showed that the train had not been under control. When this case was here (122 N. C., at page 959, 30 S. E. 348) the court said: "If the defendant, by having proper appliances [air brakes], could have avoided the injury, it is liable." Moreover, the jury had a right, as asked in the prayer, to exercise their own common sense, and to use the knowledge acquired by their observation and experience in everyday life, whether the train could have been stopped in time to prevent the disaster. *Deans v. Railroad Co.*, 107 N. C. 693, 12 S. E. 77, reiterated in *Lloyd v. Railroad Co.*, 118 N. C. 1013, 24 S. E. 805. The improved coupler not merely prevents injuries in coupling cars, but, as stated in the Official Report of the Interstate Commerce Commission, quoted in *Troxler v. Railroad Co.*, 124 N. C., at page 194, 32 S. E. 550, it makes the train solid, and, by doing away with the "slack" incident to the antiquated pin and link system, places the train more completely and quickly under the control of the engineer. This is a matter of common knowledge and common observation, but, by the judge directing the verdict, the jury were deprived of considering it.

The conductor testified that he inspected the train by merely walking round and looking under each car. Upon that testimony the court directed the jury to find that there was no defective machinery, when it should have been left to the jury, under all the circumstances surrounding the derailment, to say

what caused the disaster. They might have been convinced, notwithstanding such superficial examination, that there was some defect in the machinery which caused the truck to jump the track, or prevented the train thereafter from being stopped before several hundred feet further on, it rolled down the embankment.

Further, if the train "could have been controlled" by the air brakes on four cars and the engine, and in fact it was not so controlled, but rolled 300 to 1,000 feet after the first truck jumped the track, without being stopped (and no evidence of an attempt even to stop the train was shown), the jury might well have found either that the machinery was defective, or the train undermanned, so that the engineer did not get prompt notice. But the judge deprived the jury of considering the defectiveness of the machinery or insufficiency of appliances or the undermanning of the train by restricting the jury to the sole question whether the killing of the intestate was caused by rotten cross-ties; yet there was uncontradicted evidence that the train "had only one brakeman that day; usually had two and a flagman." The court has heretofore had occasion to condemn the growing tendency to take causes from the jury, or limit their sphere, in damage cases. The right of trial by jury is guarantied by the constitution, and on all disputed issues of fact the courts cannot be too careful to refrain from invading the province of the constitutional "triers of the facts."

And, finally, the first prayer for instruction should have been given. While the mere fact that one has been injured while in a public conveyance does not raise a presumption of negligence in the carrier, it is otherwise when the injury results from something over which the carrier has control. 1 Shear. & R. Neg. (5th Ed.) § 59. Accordingly, when there is a collision or a derailment, and in similar cases, there is a presumption of negligence. 2 Shear. & R. Neg. § 516, and numerous cases cited. Of course, this presumption extends to the occurrence, regardless of the party injured. The court has held in *Kinney v. Railroad Co.*, 122 N. C., at page 964, 30 S. E. 313, where the plaintiff was an engineer injured in a collision: "If the doctrine of *res ipsa loquitur* ever applies, it should certainly do so in such a case." In a still later case (*Marcom v. Railroad Co.*, 126 N. C. 200, 35 S. E. 423), also by a unanimous court, it is held: "Where the derailment of the engine resulted in the death of the intestate, a fireman in the employ of the defendant company, a *prima facie* case of negligence is to be inferred, and the burden is thrown upon the defendant to disprove negligence on its part." It is true that a common carrier is not an insurer of the safety of an employee, neither does it insure the safety of a passenger; but when there is a collision or a derailment, and in like cases, the presumption of negligence arises. It is a rule of evidence which in no wise springs out of the contract for carriage, but

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which arises from the fact that such things do not ordinarily happen unless there is negligence on the part of the carrier, and therefore it arises equally whether the injured party is a passenger or an employee. The negligence of a fellow servant is a defense in cases where the injury occurred prior to the "Fellow Servant Act" (chapter 56, Priv. Laws 1897). But the rule of evidence—the presumption of negligence arising from a disaster of this nature—applies none the less in such cases. Error.

Faircloth, C. J., and Furches, J., dissent.

Appeal from district court, Marshall county; G. W. Burnham, Judge.

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BACH

v.

IOWA CENT. RY. CO.

(*Supreme Court of Iowa, Oct. 18, 1900.*)

[83 N. W. 959.]

**Personal Injuries—Derailment of Train—Defect in Tracks—Question for Jury.**—In an action against a railway company for injuries occasioned by the derailment of an engine, evidence that the accident occurred at a cattle guard at the end of a switch, and was caused by the cattle guard being low, and the timbers in it rotten, causing it to sink under the weight of the engine, and the pilot to strike the guard rail and move the switch, is sufficient to require the submission of the case to the jury.

**Evidence—Photographs of Scene of Accident.\***—Photographs of the scene of the derailment of a railway train, taken just after the accident, are admissible in evidence in an action to recover for injuries sustained in the wreck.

**Evidence of Similar Accidents.†**—In an action to recover for injuries sustained by the derailment of an engine, caused by the sinking of the track under its weight, that another engine, after the accident, was run over the track, and was derailed in the same way, is inadmissible in evidence, where the engines were not alike, and the track was not in the same condition.

Action by plaintiff, who is a railway fireman, for injuries received through the derailment of a train. The answer was a general denial. Trial to a jury. Directed verdict for defendant, and plaintiff appeals. Reversed.

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\*See *Denver, etc., R. Co. v. Roller* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 595, and *foot-note*.

†See *Shaw v. Chicago & G. T. Ry. Co.* (Mich.), 18 Am. & Eng. R. Cas., N. S., 131, and *foot-note*, 132.



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Boardman &amp; Boardman, for appellant.

Binford &amp; Snelling, for appellee.

Deemer, J. As defendant's motion to direct a verdict was sustained, every fact favorable to plaintiff, and which the evidence tends to prove, must be conceded. With this in mind, we now proceed to a statement of the grounds of negligence, and of the evidence offered to sustain them. The charge is that plaintiff received his injuries through the derailment of a train, and that the negligence causing the accident consisted in the maintenance of a low cattle guard, the timbers of which were rotten and unsafe; that on or near the cattle guard there was a switch, and across the guard was a guard rail that was too high; and that the train on which plaintiff was riding was drawn by a heavy "mogul engine, and that, while running at the rate of thirty miles an hour, the engine struck this cattle guard in its defective and unsafe condition, causing it to sink, the pilot of the engine to strike the guard rail, the switch to spring, and the engine to leave the track." In support of these allegations plaintiff introduced evidence tending to show that the accident occurred at a point on defendant's track where there was a "doubling" switch; that the cattle guard was at the point of the switch; that as soon as the engine struck the switch it dropped; and that sparks flew from the right side of the engine, either from the drivers or the pilot. Another witness testified that the engine dropped when it struck the cattle guard; that sparks flew from the front end, and that it almost instantly left the track. Immediately after the accident the guard rails were examined, and found to be badly scratched and bruised. As to the cause of the accident one of the witnesses testified as follows: "The cause of this accident was the cattle guard being low, and the timbers rotted under it, so it would give it a chance to sink when a heavy weight would strike it. When the trucks struck it, it sank, and the pilot struck the guard rail, and moved the switch, and the engine was thrown in onto the side track. \* \* \*

The timbers themselves, being the cattle guard, were rotten, and the front of the engine struck the rails over these timbers, and they sunk down; and there were joints in the rails which would let it sink every time, and when it thus sank down the pilot caught the guard rail, and let the engine in there. The track was not strong enough in there to hold up one of these large engines going at the speed it was going, and consequently the track gave way. I know the pilot struck the guard rail by the way the front of the engine dropped. Just before the wreck the switch was set for the main line." Another testified regarding the condition of the cattle guard as follows: "The cattle guard at the point of the accident was about two inches too low, and had been for six or seven months prior to the accident. \* \* \*

I own the land each side the cattle guard. Was about the cattle guard once a week, or maybe once a

month. The ground at cattle guard was springy. The guard was full of dirt or mud up to the mudsills. Had been so ever since I bought the place. I noticed, after the accident, marks, scratches, bruises, and mutilations, on the guard rail. The whole of the cattle guard was depressed two inches. The mudsills were covered with mud and dirt to nearly the top. The cattle guard, in my opinion, was two inches lower than it ought to be. \* \* \* The rails were depressed because at the end of the cattle guard was a doubling switch, which gave it a chance to depress. The cattle guard was low. The guard rail was high the morning after the accident." Another said, "The depression in the cattle guard looked to be one and one half or two inches." Still another said the guard rail was high, and the undersills were rotten. One of defendant's section men said he took out the cattle guards, and that they were a little rotten. There was also evidence to the effect that the switch was set for the main line, both before and after the accident, and there is no room for the suggestion that the derailment might have been caused by the unauthorized throwing of the switch. Surely this evidence was sufficient to take the case to the jury. The circumstances were such as that a jury may have been satisfied that the cattle guard and the rails were defective; that defendant knew, or ought to have known, of the defect; and that these defects were the cause of the derailment of the train. It is not a case of pure conjecture, as defendant's counsel argue. From the evidence we have quoted, a jury might conclude that the alleged defective condition of the cattle guard was the proximate cause of the injury. Much more than the mere happening of the accident is proven. When the facts are not in dispute, and reasonable men may honestly differ as to the conclusion to be drawn therefrom, the case is for the jury, and not for the court. *Moore v. Railway Co.*, 93 Iowa, 484, 61 N. W. 992; *McFall v. Railway Co.*, 96 Iowa, 723, 65 N. W. 321; *Kerns v. Railway Co.*, 94 Iowa, 126, 62 N. W. 692; *McLeod v. Railway Co.*, 104 Iowa, 139, 73 N. W. 614, and cases cited.

Plaintiff offered in evidence photographs of the scene, taken just after the accident. The court was in error in not receiving them in evidence.

Some days after the accident, another engine belonging to the defendant was run over the cattle guards and switch in question, and it sprung the switch, and ran off the track, just as the engine did on which plaintiff was injured. Evidence was offered to prove this fact, but it was rightly rejected. The engines were not the same, either in make or build; the track was not in the same condition; and there was no proof that the cattle guard and switch were in the same state of repair as before the accident. Indeed, there is every reason to think they were not, for the train that was wrecked at that point must have made a material change in the situation. For the errors pointed out, the judgment is reversed.

Granger, C. J., not sitting.

LAKE ERIE & W. R. Co.

v.

WILSON.

(*Supreme Court of Illinois, Feb. 20, 1901.*)

[59 N. E. 573.]

**Death of Switchman—Defect in Track—Admissibility of Evidence.**—Defendant's evidence that the side track was ballasted in the usual and customary manner is properly excluded, there being no complaint as to the general condition of the ballast, but it being claimed only that there was a certain depression, surrounded by weeds, into which a switchman, plaintiff's intestate, stepped, causing him to fall and to be run over.

**Same—Same—Same—Photographs.\***—The controversy being as to whether there was a hole in the side track at the place of the accident to a switchman, and, if so, how large it was, and as to how many and how large weeds were on it, and there being a sharp conflict in the evidence, exclusion of photographs of the place taken soon after the accident is error; the weeds being gone, and the condition changed, at the time of the trial, a year later, and the preliminary proofs for admission of the photographs being full and complete.

**Same—Same—Assumption of Risk.†**—An instruction in action for death of a switchman from stepping into a hole in a side track should not direct a verdict for plaintiff in case the jury made certain findings which did not include one that deceased did not know of the defect, or have equal means with defendant for such knowledge, though they were required to find that he had been in the exercise of ordinary care; there being a question not only of negligence, but of assumption of risk.

MAGRUDER, J., dissenting.

Appeal from appellant court, Third district; F. Bookwalter, Judge.

Action by Theodosia Wilson, administratrix, against the Lake Erie & Western Railroad Company. From a judgment for plaintiff, affirmed by appellate court (87 Ill. App. 360), defendant appeals. Reversed.

H. M. Steely and John B. Cockrum, for appellant.

Mabin & Clark, for appellee.

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\*See preceding case, *Bach v. Iowa Cent. Ry. Co.* (Iowa), and *foot-note*.

†See general *note*, on assumption of risk, 11 Am. & Eng. R. Cas., N. S., 48 of seq.

As to assumption of risk arising from unballasted side tracks, see *Louisville & N. R. Co. v. Bowcock* (Ky.), 17 Am. & Eng. R. Cas., N. S., 421, and *note*, 428 of seq.

Cartwright, J. Appellee brought this suit, as administratrix of the estate of her deceased husband, Art M. Wilson, against appellant, to recover damages for his death while in the employ of appellant, which occurred August 22, 1898, in the switch yards at Rankin, Ill. Her declaration

Case Stated.

contained four counts, to the second and fourth of which demurrers were sustained, and the case was tried on the first and third. The first count averred that said Art M. Wilson was a switchman in the employ of the defendant in said yards; that the defendant negligently failed to keep its switch track in reasonably safe repair by permitting large quantities of grass and weeds to accumulate between the rails, rendering the track dangerous and unsafe, of which accumulation of grass and weeds defendant had, or, by the exercise of ordinary care, might have had, knowledge, and that while said Art M. Wilson was attempting to couple cars, in the exercise of due care and caution for his own safety, he caught his foot in said grass and weeds, and was unable to free himself before one of the cars which he was attempting to couple struck him, and crushed and mangled his leg so that he afterwards died from the injuries. The third count made the same averments as to employment and injuries, and alleged that the defendant failed to properly ballast its switch track by carelessly and negligently permitting a large hole to be and remain along the side of one of the ties, of which hole the defendant knew, or, by the exercise of ordinary care, might have known; and that said Art M. Wilson caught his heel on the part of said tie which projected above the surface, and was run over. To these counts the defendant pleaded the general issue. There was a trial, and the jury found the defendant guilty under the issues so joined, and judgment for \$2,000 was entered in pursuance of the verdict. The appellate court affirmed the judgment.

At the close of the evidence for the plaintiff, and again after all the evidence was in, the defendant asked the court to give the jury an instruction to find it not guilty. The instruction was refused, and an assignment of error based upon the refusal raises the question whether there was any evidence fairly tending to prove the plaintiff's cause of action, so as to require the submission of the issues to the jury. When the instruction was asked, the following facts had been proved and were not controverted or in dispute: Art M. Wilson had been working for the defendant about six months as brakeman and switchman, and had worked in the switch yards at Rankin from midnight until 6 in the morning since June 29, 1898. About 2 o'clock in the morning of August 22, 1898, he was working as usual, when a freight train drew in from the west on side track No. 1. The switch engine took such cars from the east end of this train as were not to go further east, and was putting in other cars and making up a train to go east. The east end of the east car left standing on the side track had a Janney coupler,

which would couple to a similar coupler without a link and pin or would couple with an ordinary drawbar and coupler by means of a link and pin. The switch engine was pushing a number of cars towards the part of the train standing on the side track, and the west end of the west car had a common, or skeleton, draw bar, which coupled with a link and pin. For the purpose of making the coupling, a link and pin had been put in the Janney coupler, and as the moving cars were being pushed by the switch engine towards the standing car, and while still some distance therefrom, Wilson stepped on the track in front of the west end of the moving cars. The natural object in going there would be to put a pin in the drawbar preparatory to coupling the cars afterwards when they should come together. He was caught by the moving cars and dragged along about 90 feet, which was shown by blood on the track and the mark of a heel in the cinders and ballast. When the moving cars were stopped, and he was removed, they were still two or three car lengths from the standing portion of the train to which they were to be coupled. His left leg was badly mangled, and he died shortly afterwards. The matters of fact in dispute were as to the existence of the alleged hole where the car first struck Wilson, and the number, height, and thickness of the weeds and grass between the rails. The evidence on the part of the plaintiff tended to prove that there was a hole or depression on the side of the tie at that place next the north rail, from 3 to 4½ inches deep, 4 or 5 inches wide, and 6 or 7 inches long,—large enough to admit the heel and part of the foot of Wilson; and that the mark of dragging the heel started from that hole. The evidence for plaintiff also tended to prove that there were a great many weeds between the rails, some of them 18 inches high above the ballast; and that there were weeds in the latches of Wilson's shoe where he was dragged through them. The circumstances tending to prove a knowledge of such conditions on the part of the respective parties, or to charge them with knowledge, were before the jury, and it was not error for the court to refuse to withdraw the issue from the jury.

Complaint is made that the court refused to allow defendant to prove that the side track was ballasted in the usual and customary manner. There was no complaint of the general condition of the ballast, but plaintiff herself proved it to be level, with the exception of this hole. As the manner in which the track was ballasted was not in controversy, evidence that it was done in the usual and customary manner was not proper. The condition of the track was the subject of much conflicting testimony. The claim of the plaintiff was that Wilson, when he went before the moving cars, stepped into the alleged hole, and fell down; and the claim of the defendant was that he went in there with a pin, which was afterwards found lying on the track, to put it in

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the drawbar, and that he dropped the pin, stooped down to pick it up, and was run over. The evidence on the part of the defendant tended to prove that there was no hole or defect in the track further than the print of a heel and instep of a shoe in the cinders next the tie where the beginning of the mark was, and that it continued from there just deep enough to show that something had been dragged along in the cinders and gravel. With reference to the weeds, there was no controversy as to the existence of some weeds between the rails. They were what are commonly called "ragweeds," but there was a sharp conflict in the evidence as to whether they were many or few, and as to their size. The evidence for the defendant was that they were few and scattering, the tallest not over a foot high, and what few there were had been burned and whipped off by the switch engine. Both parties took photographs of the track soon after the accident, and identified them at the trial. The plaintiff did not offer in evidence the photographs taken and identified on her behalf, but the defendant offered the photographs taken by it, together with the testimony of the person who took them that he was a photographer by occupation, that he had been engaged in that business for 20 years that he was directed to make true likenesses of the tracks, —the truest he could,—and that the photographs were true representations of the premises shown in them. He also testified from what points they were taken; and two other witnesses testified that there had been no change whatever in the tracks, weeds, ballast, or conditions after the accident up to the time the photographs were taken. The court excluded the photographs. Each party had caused the place to be examined by witnesses, and their testimony was conflicting. The trial was the next year after the accident, when the weeds were gone, and the condition changed, and the question is whether, under those circumstances, the defendant was entitled to the benefit of photographs as evidence.

The general rule is that photographs stand on the same footing as a diagram, map, plan, or model, and that a photograph is a legitimate mode of proving a condition which can be shown by a representation of that sort. It rests, to some extent, upon the credit of witnesses, in the same way as a map, plat, or plan; but that fact furnishes no reason for excluding it as evidence. 1 Greenl. Ev. (16th Ed.) 546. Each party has the same opportunity to offer evidence as to whether the picture correctly represents the appearances. The preliminary proof of the correctness of the picture, the ability of the operator, and the accuracy of the instrument is addressed to the court, and it is not error to exclude photographs taken a long time after an accident, where the situation has been changed, and the operator is shown to be inexperienced. *Railway Co. v. Monaghan*, 140 Ill. 474, 30 N. E. 869. In this case the preliminary proof was full and complete,

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and the photographs are in the record, and show a perfectly natural representation of railroad tracks and surroundings. There was nothing in the evidence nor in the photographs themselves tending to discredit their accuracy. Under such conditions, photographs of things which cannot be produced in court as evidence are generally admissible in evidence, the same as a map or plan. 11 Am. & Eng. Enc. Law (2d Ed.) 539, and cases there cited. In *Com. v. Morgan*, 159 Mass. 375, 34 N. E. 458, it was held proper to admit in evidence a photograph of defendant for the purpose of showing that when it was taken he wore side whiskers. In *Alberti v. Railroad Co.*, 118 N. Y. 77, 23 N. E. 35, 6 L. R. A. 765, it was held proper to receive in evidence a photograph of plaintiff's limbs, and in *Duffin v. People*, 107 Ill. 113, a photographic copy of a note which had faded out was admitted in evidence. In this case the photographs were an important means of proving the condition of the track, and, under the circumstances, we think the defendant had a right to have the jury see them in connection with the other evidence, and it was error to exclude them.

The first instruction given at the request of the plaintiff, after correctly stating the duty of the defendant to use reasonable and ordinary care to provide a suitable and safe place for its servants to work, directed the jury to find the defendant guilty if they found, from the evidence, certain facts stated in the construction. The hypothesis of fact so stated, from which the court drew the legal conclusions of guilt and ordered a verdict, is as follows: (1) That Art M. Wilson was employed as a switchman by the defendant in the yards at Rankin; (2) that the defendant carelessly and negligently permitted a hole to be and remain upon the side track in the premises in question; (3) that the same was dangerous to switchmen; (4) that the defendant had knowledge of the existence of said hole, or, by the exercise of ordinary care, might have known it; (5) that while Art M. Wilson was in the usual course of his employment, and in the exercise of due care and caution for his own safety, he, by reason of the said hole, caught his foot on a tie in the track, and fell down, and was run over by the defendant's car, and afterwards died of such injury. The fourth instruction given at the instance of plaintiff also ordered a verdict in her favor upon proof of certain facts. These facts were: (1) That Art M. Wilson was employed as switchman; (2) that defendant carelessly and negligently permitted the track between the rails to be grown up with grass and weeds; (3) that such grass and weeds were dangerous; (4) that Art M. Wilson, while in the usual course of his employment, and while exercising due care and caution for his own safety, by reason of said grass and weeds caught his foot in the grass and weeds, and was unable to free himself before the car struck and injured him, and died from such injury.

It was the duty of the defendant to exercise ordinary care

to provide a reasonably safe switch track as a working place for Wilson, and to exercise ordinary care to keep the track in a reasonably safe condition. At the same time, Wilson was held to assume the risks from defects which were known to him, where, as in this case, there had been no promise to repair the defect. If defects are obvious and open to the observation of every person of ordinary intelligence, and the evidence shows that the employee has had full opportunities for such observation, it is sufficient to charge him with knowledge. 3 Elliott, R. R. § 1312. The duty and liability are the same with regard to the place of work and the appliances with which the work is done; and the rule is that the servant, in order to recover, must establish three propositions: First, the existence of the defect; second, that the master had notice thereof, or in the exercise of ordinary care would have had knowledge of it; and, third, that the servant did not know of the defect, and had not equal means of knowing with the master. *Goldie v. Werner*, 151 Ill. 551, 38 N. E. 95; *Howe v. Medaris*, 183 Ill. 288, 55 N. E. 724. It is manifest that any instruction by which the court assumes, as a matter of law, to direct a verdict, must embrace these propositions, and neither of these instructions embraced the third. It is true that they require Wilson to have been in the exercise of ordinary care; but the rule prohibiting a recovery for a defect known to him, which the defendant had not promised to remove, does not rest upon the ground of contributory negligence on his part, but upon his contract under which he entered the service of defendant. In such case it is not a question of negligence on the part of the servant, but of the risk assumed by him. 3 Elliott, R. R. § 1311. There was no complaint of the original construction of the side track in this case, or of the manner of such construction. One witness for plaintiff said that it looked like the hole had been there some days, and that, aside from this hole, the track was level. Another said that it had the appearance of having been there several days, but he could not tell how long. Another, that it looked as though they had scraped dirt off, and part of it was fresh where they threw the gravel off, and that part of the hole looked as though it was new, and had been disturbed. The tendency of the evidence was that, if there was a hole there, it was not made in the original construction, but had been made recently. The question how long it had been there, and what knowledge the parties had of it, was important. It is true, as contended by counsel, that, if Wilson knew of the defect, he must have known that it was dangerous. *Railroad Co. v. Knapp*, 176 Ill. 127, 52 N. E. 927. But, where the danger is obvious to a person of ordinary intelligence, the law will charge him with knowledge of it. Where a person is old enough to comprehend a danger, and is familiar with the place and the location, his duty to exercise ordinary prudence and care would



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charge him with notice of it. In this case, plaintiff was bound to prove that the defendant had, or ought to have had, knowledge of the alleged condition, and that Wilson did not have, and did not have equal means of, such knowledge. The instructions were wrong in directing a verdict without proof of the omitted fact. The judgments of the circuit court and appellate court are reversed, and the cause is remanded to the circuit court. Reversed and remanded.

Magruder, J. (dissenting). I do not concur in all the views expressed in this opinion, nor in the conclusion reached by it. Some of the positions taken are opposed to the law as heretofore laid down by this court. In my judgment, the opinion of the appellate court, delivered upon the decision of the case, correctly disposes of the questions and issues involved. That opinion is as follows:

"Appellant was sued by appellee in this action on account of negligence, resulting in the injury and death of Art M. Wilson, appellee's intestate. The declaration, on two counts of which, only, issues were joined, charges that appellant negligently permitted grass and weeds to grow between the rails of its side track at Rankin, Illinois, thereby rendering it dangerous and unsafe to couple and uncouple cars there; and that, while Art M. Wilson, in the discharge of his duties as switchman for appellant there, in the exercise of ordinary care for his own safety, was coupling cars, his foot caught in such grass and weeds, and he was thrown down and injured by the cars, which injuries resulted in his death; and that in like manner his death was caused by reason of a hole in the ballasting of such side track, in which deceased caught his heel. Trial by jury resulted in a verdict and judgment against appellant for \$2,000, which, by this appeal, it is sought to have reversed, various errors being urged, as alleged, to attain that object. Appellee maintained a side track at Rankin, Illinois, which was used for switching purposes. It is clearly shown, though the evidence is conflicting in other phases of the case, that numerous weeds, called 'ragweeds,' grew between the rails of this side track, and that at the place where deceased fell a shallow depression existed by the side of a tie between the rails, and that the deceased, while acting in the line of his employment, on the night of August 23, 1898, went on the side track to couple cars, and, as the moving section of the train approached the standing car, he stepped his left foot between the rails to set the coupling pin and insert the link. Instantly the engineer received a signal to stop, and on doing so it was found that deceased had been caught by the wheels and dragged a considerable distance on the track, and his left leg crushed, from which injury he expired after a few hours. An impression, probably made by the heel of his shoe, extended the length of the distance he was dragged, from the depression or hole at the side of the tie where he stepped in. Much evidence was had relative to the size of this hole, but,

independently of its size, it is well established such a place was there. To the credibility of a colored witness, who testified at the instance of appellee, much impeaching evidence was directed. It further appears from the evidence that deceased had been employed by appellant for six months, and that it was customary, in the performance of his duties in making couplings with link and pin, to step one foot between the rails. Appellant offered proof that the side track was ballasted in the usual and customary manner, and, objection being made to its introduction, the court sustained the objection, which action of the court is considered by appellant prejudicial error. To the introduction of certain photographs offered by appellant the court also sustained objections, which is also presented to this court as error. It is further urged that the court admitted improper and excluded proper evidence, and gave improper and refused proper instructions, and that a motion presented and an instruction offered at the close of appellee's evidence, and again at the close of all the evidence, in substance to exclude the evidence and direct a verdict for appellant, should have been allowed and given, and was erroneously refused.

"The testimony of the colored witness—a roving fellow—was to the effect that he was present when the injury occurred, and was then holding a lantern for the deceased, and as Wilson stepped between the rails his left foot went into a depression, and he sank to his knees, where the wheels caught him. The witness also stated that a few minutes after the accident he took parts of weeds from the shoe latches of deceased. In view of the character of the impeaching evidence offered against the credibility of this witness, it may be proper to discuss briefly the probative force of all the evidence exclusive of his testimony. When the deceased stepped with one foot between the rails to make this coupling, it so sufficiently appears that he was acting in the line of his employment in the usual and ordinary manner, under the circumstances then confronting him, that the ordinary mind is compelled to conclude that he was exercising that ordinary care for his own safety commensurate with the law of the land. Opportunities were there for producing just the accident which befell him,—a depression or hole and weeds growing about,—and it is not without the bounds of ordinary human knowledge to conclude, from all the circumstances in this record, that such was the cause of his death. Certainly it was the duty of the master to furnish reasonably safe premises for the operation of this business, and it was the duty of the jury to determine whether, at the time of the injury, the premises were so. In this they found against appellant, which, in the condition of the proof, must be taken as final. The proof tending to show that the condition of the ballast at this particular point was due to operations of other workmen of appellant who had charge of this track, it surely follows that appellant is chargeable with notice,

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coming at last within all rules prescribing its liability in such cases.

"As to the contention that it was error to exclude proof that the side track was ballasted and maintained in the usual and customary manner, we need only revert to the issues to determine that the general condition of the ballast of the track was not open to the consideration of the jury. It was only material what such condition of the premises was at the particular point of this occurrence, clearly defined by the evidence. With that in view, it was wholly proper, and not error to sustain the objection.

"While the photographs offered by appellant may have been admissible, as is contended, yet it is not seen that they develop anything new, or strengthen the proof for appellant. Their admission is ever subject to the discretion of the trial court, in view of other established facts, which, sensible of its obligation relative thereto, excluded them. We cannot hold that action of the court an abuse of that discretion. It was not prejudicial error.

"According to the views expressed here, sufficient proof tending to uphold the position of appellee was presented, at the times motions to exclude the evidence and instructions to direct a verdict were made, to warrant submitting it to the jury. Such was the action of the court, and in it there was no error.

"It being urged that several instructions were improperly given for appellee, and some improperly refused for appellant, the instructions complained of have been carefully examined. It is found that no substantial error exists in the instructions. They seem to state the law applicable to the case, and the principles contained in those refused were contained in others given.

"Finding no substantial error, the judgment of the circuit court will be affirmed."

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**KNOPF**

*v.*

**PHILADELPHIA, W. & B. R. Co.**

*(Superior Court of Delaware, March 12, 1900.)*

[46 Atl. 747.]

**Incriminating Witness.**—Where an engineer had testified that he was running his train at the time of the accident at a greater speed than allowed by law, the question on cross-examination, how he happened to be running at such speed, was not objectionable, as incriminating the witness, where the witness stated that he was not afraid to answer it.

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**Evidence.**—On an issue as to the rate of speed of a train in the city of W., the question, "What is your schedule time between W. and L.?" is irrelevant.

**Crossings—Duty to Look for Cars.**—When a person approaches a railroad crossing with which he is familiar, he is bound to avail himself of his knowledge of the locality; and, if his line of vision is obstructed, he must exercise greater care in looking for approaching cars than if the view is unobstructed.

**Same—Same.\***—When a person drives on a railway crossing without looking for approaching cars, he is guilty of negligence.

**Speed in Violation of Ordinance as Negligence.†**—Running a train through a city at a greater rate of speed than allowed by the ordinances of the city is negligence, and, if such speed is the proximate cause of an injury, the railway company is liable, in the absence of contributory negligence.

**Personal Injuries—Elements of Damage.‡**—Plaintiff can recover for personal injuries such sum as will compensate him for his loss of time and wages, and for his pain and suffering in the past, and for any permanent injuries resulting from the accident which will impair his ability to earn a living in the future, and for his expenses incurred for medicine and medical treatment.

Action on the case by Jacob Knopf against the Philadelphia, Wilmington & Baltimore Railroad Company to recover from the defendant company damages for personal injuries alleged to have been sustained by the plaintiff, and also for injury to his baker wagon, by reason of the negligence of the defendant company, on the 2d day of June, 1898, at the railroad crossing near Landlith station, in the city of Wilmington.

Argued before Lore, C. J., and Pennewill and Boyce, JJ.

William S. Hilles and Robert H. Richards, for plaintiff.

Andrew C. Gray and Herbert H. Ward, for defendant.

At the trial the witness Albert J. Beckley, engineer of the defendant company's train which was alleged to have caused the injury, was asked in cross-examination by Mr. Hilles: "How did you happen to be running your train at the rate of twelve or fifteen miles an hour in the city of Wilmington?" This was objected to by counsel for defendant, who stated that the witness had already testified that he was running his train 12 or 13 miles an hour; that an ordinance of the city of Wilmington had been admitted in evidence in the case, which ordinance subjects an engineer to a penalty. The objection, therefore, was that the witness was not required

\*See generally, *Smith v. Boston & M. R. Co.* (N. H.), 19 Am. & Eng. R. Cas., N. S., 320, and *foot-note*, 321.

†See *Jackson v. Kansas City, etc., R. Co.* (Mo.), 19 Am. & Eng. R. Cas., N. S., 99, and *note*, 119 *et seq.*

‡See notes at end of case.

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to answer the question, and subject himself to any penalty he may be liable to under the ordinance. Counsel for plaintiff contended that the question was in direct reply to the examination of the witness.

Pennewill, J. We think that the right of a witness to refuse to answer a question on the ground that he may incriminate himself is one personal to the witness, and can be claimed by himself alone.

The witness thereupon stated, in reply to a question by the court, that he did not exactly know what was meant by an answer that would incriminate him, but that he was not afraid to answer the question because it would make him liable to the penalty of the law, and did not decline to answer on that ground.

Pennewill, J. We think that admits it.

The witness was further asked by Mr. Hilles what his schedule time was between the city of Wilmington and Landlith station.

This was objected to by counsel for defendant as irrelevant, because the inquiry should be confined to what speed the train was making at Landlith station, and not what speed it was making at other points.

Pennewill, J. The question is, what was the actual rate of speed of this train at the time and place of this accident? We think the question is not admissible.

After the presentation of prayers by the respective counsel, the court charged the jury as follows:

Pennewill, J. (charging jury). In this action the plaintiff, Jacob Knopf, seeks to recover from the Philadelphia, Wilmington & Baltimore Railroad Company, the defendant, damages for personal injuries to himself, as well as for injury to his wagon, all alleged to have been caused by the negligence of the defendant company, on the 2d day of June, 1898, at the railroad crossing near Landlith station, in this city. The plaintiff charges that the defendant was negligent—First, in running the train which caused the accident at a high rate of speed; second, in permitting obstructions to remain on the tracks of the company, so that the plaintiff was prevented from seeing the approaching train; and, third, in not giving timely and proper warning of the approach of the train. The defendant company contends that it was not guilty of any negligence which caused the injury to the plaintiff, that it (the company) exercised all reasonable and proper care and diligence to prevent the accident, and that the injury was caused by the negligence of the plaintiff. The defendant therefore denies any and all liability for said injury. With the facts in the case the court have nothing whatever to do. They are for you alone. You have heard the evidence, and it is now for your consideration and determination; applying thereto

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the law as the court shall declare it to you. The principles of law applicable to this case have been so clearly settled by the courts of our own state that we do not consider it at all necessary to look beyond the reported decisions of our courts for the rules to guide us and you in the consideration and determination of the present action.

This suit is based on negligence, and it is proper that we should explain to you what negligence, in legal contemplation, is. It has been defined to be the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would exercise under similar circumstances. What constitutes negligence is a question of law, for the court; but whether negligence exists in the particular case is a question of fact, for the determination of the jury. It is for you to determine whether there was any negligence that caused the injury complained of, and if there was, whether it was the negligence of the defendant or the plaintiff. And we say to you that the defendant can only be held liable for such negligence as constitutes the proximate cause of the injury. *Murphy v. Hughes*, 1 Pennewill, 250, 40 Atl. 187; *Mills v. Railway Company*, 1 Marv. 269, 40 Atl. 1114. Negligence is never presumed, but must always be proved, and the burden of proving it rests upon the plaintiff. With respect to the matter of negligence, we say to you that certain things are, or amount to, negligence, in law, whether any active or positive negligence be proved or not. The violation of an ordinance of this city is of itself (per se, as we may say) an act of negligence, which, in a legal controversy like this, only requires to be proved, to render a wrongdoer liable from any injury resulting from such misconduct. *Robinson v. Simpson*, 8 Houst. 406, 32 Atl. 287; *Shear. & R. Neg.* §§ 13, 467, and cases cited; 3 Elliott, R. R. § 1095, note 1; *Giles v. Iron Co.*, 7 Houst. 453, 466, 8 Atl. 368; *Iron Co. v. Giles*, 7 Houst. 566, 11 Atl. 189; *Jones v. Belt*, 8 Houst. 562-564, 32 Atl. 723; *Carswell v. City of Wilmington*, 2 Marv. 360-365, 43 Atl. 169. In such case, however, the defendant would not be liable unless the violation of the ordinance (to wit, in this case, the excessive speed of the train) caused the injury complained of; nor would the defendant be liable if the injury was caused in any degree by the negligence or careless conduct of the plaintiff. The law does not permit any one to recover damages from another for an injury if his own negligence has contributed thereto, or where by the exercise of reasonable care he could have avoided it. *Murphy v. Hughes*, 1 Pennewill, 250, 40 Atl. 187.

Nowhere have we found the law applicable to cases like the present more clearly stated than in the case of *Patterson v. Railroad Co.*, 4 Houst. 103, in which Chief Justice Gilpin, in delivering the opinion of the court, said: "The terms 'ordinary care' and 'diligence,' when applied to the management of railroad engines and cars in motion, must be understood,

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however, to import all the care, circumspection, prudence, and discretion which the peculiar circumstances of the place or occasion reasonably require of the servants of the defendant company; and this will be increased or diminished according as the ordinary liability to danger and accident and to do injury to others is increased or diminished in the movement and operation of them. \* \* \* But, on the other hand, it is equally well settled, as a principle of law, that the plaintiff was also bound at the same time to use ordinary prudence, care, and diligence to avoid the accident and injury which occurred to him on that occasion. \* \* \* And the care and diligence which he is bound to exercise must be in proportion to the danger to be avoided; that is to say, he is bound to use such care, prudence, and diligence as a reasonably prudent man, under the peculiar circumstances of the case, would exercise to preserve himself from being injured." As was said by Chief Justice Comegys in the case of *Parvis v. Railroad Co.*, 8 Houst. 446, 17 Atl. 702, "due care," in the case of the companies, means ordinarily the timely employment of sufficient signals or warnings notifying the approach of trains to public places, such as highway crossings, etc., and, in the case of individuals, due circumspection or listening, or both, when practicable, to avoid collision; and, the greater the peril to the individual, the greater the duty of care by the company, and of prudent and due caution on the part of the individual. At places of great danger, great care must be taken by both parties. This, after all, is but common sense, the force of which must be evident to every one. It was the duty of the defendant, said the chief justice, to make use of all the usual and appropriate means, as bell and whistle, to warn wayfarers who might be passing along the highway, intending to cross the railroad, of the approach of the train; and it was in no way absolved from that duty by an act of assembly providing for the ringing of the bell. The intent of the act was to punish engineers and others for not doing their duty, and not to relieve the company from the common-law duty of taking the usual means to warn people of danger. If the defendant failed to make use of such usual and appropriate means to warn the plaintiff at the time of the accident, it would be negligence on its part; and, if the accident occurred by reason of its failure so to do, the defendant would be liable for the injury to the plaintiff, provided the plaintiff did not by his own negligence or want of care contribute in some degree to his injury.

It is a general rule of law that persons crossing a railroad are bound to the reasonable use of all their senses for the prevention of accident, and also to the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise in like circumstances. A person approaching a railroad crossing with which he is familiar is bound to avail himself of his knowledge of the locality and act accordingly. If,

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as he approaches the crossing, his line of vision is obstructed, he is bound to look for approaching cars in time to avoid collision with them; and if he does not look, and for this reason does not see an approaching car until it is too late to avoid a collision, and he is thereby injured, he is guilty of negligence, and could not recover therefor. When the view at the crossing is obstructed, greater care is necessary than in places where the view is unobstructed. *Brown v. Railway Co.*, 1 Pennewill, 335, 40 Atl. 936; *Price v. Charles Warner Co.*, 1 Pennewill, 462, 42 Atl. 699. If a person drives up to a railroad crossing and upon it, not only without stopping, but without looking out or listening to ascertain if any train is approaching, and a collision and injury occur to him from a passing train, which would have been prevented had the person so injured exercised the proper and ordinary prudence, care, and caution mentioned, such person would be guilty of contributory negligence, and could not recover from the railroad company for such injury. *Lynam v. Railroad Co.*, 4 *Houst.* 599.

If you shall believe from the preponderance (that is, the weight) of the evidence in this case that at the time of the accident the train which struck the plaintiff was running at a rate of speed in excess of six miles an hour, in violation of the ordinances of the city of Wilmington, and that such excessive speed was the proximate cause of the injury to the plaintiff, and shall also believe that the plaintiff was free from any negligence on his own part that contributed in any way to his injury, then your verdict should be for the plaintiff. Or, if you should believe from the preponderance of the evidence that at the time of the accident the defendant was not exercising ordinary care and diligence (that is, all the care and circumspection, prudence and discretion, that an ordinarily prudent and careful man would have exercised under the circumstances), and that the want of such care and diligence was the proximate cause of the injury to the plaintiff, and shall also believe that the plaintiff was free from any negligence that contributed in any way to his injury, then your verdict should be for the plaintiff. But if you should believe that it has not been shown by the preponderance of the testimony that the negligence of the defendant was the proximate cause of the injury to the plaintiff, or if you should believe that the negligence of the plaintiff himself contributed to the injury complained of, your verdict should be for the defendant.

If you should find for the plaintiff, your verdict should be for such sum as you believe, from the testimony, will reasonably compensate him for his injuries, including therein his loss of time and wages; for his pain and suffering in the past, and such as may be in the future, in consequence of the accident; and also such sum for any permanent injuries caused by the accident as you believe will cover his pecuniary loss from his impaired ability to earn a living in the future. If you should



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find for the plaintiff, he would also be entitled to recover any expenses shown by the testimony to have been incurred by him for medicines or medical treatment on account of said injuries, and also such sum as you believe from the evidence would reasonably compensate him for the loss and damage to his wagon caused by the accident. *Murphy v. Hughes*, 1 Pennewill, 250, 40 Atl. 187.

Verdict for plaintiff for \$2,500.

## NOTES.

**Personal Injuries—Elements of Damage—Loss of Time and Wages.**—See *Louisville & N. R. Co. v. Woods* (Ala.), 11 Am. & Eng. R. Cas., N. S., 872, and *note*, 872 *et seq.*

**Same—Same—Pain and Suffering.**—See *Omaha St. Ry. Co. v. Emminger* (Neb.), 12 Am. & Eng. R. Cas., N. S., 188, and *notes*, 193 *et seq.*

**Same—Future Pain and Suffering.**—See *notes*, 12 Am. & Eng. R. Cas., N. S., 193 *et seq.*

**Same—Same—Medical Treatment.**—See *Cobb v. St. Louis & H. Ry. Co.* (Mo.), 13 Am. & Eng. R. Cas., N. S., and *foot-note*; *Omaha St. Ry. Co. v. Emminger* (Neb.), 12 Am. & Eng. R. Cas., N. S., 188, and *notes*, 195 *et seq.*

## GRAYBILL

v.

CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of Iowa, Jan. 18, 1901.*)

[84 N. W. 946.]

**Injury to Stock—Liability as Affected by Failure to Give Statutory Crossing Signals.\***—The failure to observe the statutory regulations requiring a locomotive approaching a crossing to sound its whistle and ring its bell is negligence, which will warrant a recovery for cattle injured by the failure so to do, as such statutes are not solely for the protection of human beings.

**Same—Same.**—Where there is evidence in an action for cattle injured at a railroad crossing, from which it can be inferred that the accident would not have happened if the statutory signals had been given, it is not error to instruct that the failure to give such signals was negligence, but that it would not warrant a recovery unless the signals, if given, would have prevented the cattle from going on the track.

**Same—Duty of Trainmen Where Cattle Are Seen near Track.†**—An instruction, in an action for cattle injured by a train at a crossing, that

\**Ford v. St. Louis, I. M. & S. Ry. Co.* (Ark.), 15 Am. & Eng. R. Cas., N. S., 142, and *foot-note*..

†See *Yazoo & M. V. R. Co. v. Wright* (Miss.), 19 Am. & Eng. R. Cas., N. S., 239, and 240 *et seq.*

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if the cattle were moving towards the track the failure of the engineer to give the statutory signals or stop the train would constitute negligence, is not erroneous, when qualified by the statement that they must be doing so in such a way as to lead an ordinarily prudent person to believe that that they would go on the track and be struck by the train.

**Same—Special Train—Instructions.**—The refusal of an instruction, in an action for injuries to stock at a crossing by a special train, that the defendant had the right to run its trains at any time of the day or night, without regard to schedule, and that the fact that the stock was injured by special trains is not to be considered as negligence, or as creating any liability on the part of defendants under the facts, is not error, where an instruction is given that the defendant had the right to run its trains at any time of the day or night, and the fact that the train was an extra train, or not running on schedule time, did not constitute negligence.

**Pleading.**—Where the petition is short and unambiguous in charging the defendant with negligence, it is not error to recite the pleadings or refer to them in the instructions.

Appeal from district court, Pottawattamie county; A. B. Thornell, Judge.

Action to recover the value of stock killed at a highway crossing. There was a trial to a jury, and a verdict and judgment for the plaintiff. The defendant appeals. Affirmed.

J. C. Cook, for appellant.

Riley Clark and H. L. Robertson, for appellee.

**Sherwin, J.** The stock in question escaped from the plaintiff's inclosure, and were killed in the day time, on a highway crossing, by a train running as a special. Negligence is charged, in the operation of the train, in not using due care and watchfulness, and in not using the whistle and bell before reaching the crossing where the cattle were killed. It is also charged that the train was a wild one, and was at the time being run at a dangerously high rate of speed. There is a sharp conflict in the evidence as to whether the whistle was sounded and the bell rung at the whistling post for that crossing, and as to when the first danger signals were in fact given. The court instructed the jury that the statutory requirement that the "whistle shall be twice sharply sounded at least 60 rods before a road crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed," was for the safety of animals as well as persons, and that "a failure to give the signals required by this statute would be negligence on the part of the defendant; but, before such negligence would justify a recovery against the defendant, it must appear that if such signals had been given they would have prevented the cattle going on the track or frightened them away from the crossing." The

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appellant urges that this instruction is erroneous, applied to the facts in this case. We do not understand the contention to be that no case can possibly arise in which the aid of the statute can be invoked to protect live stock, but the claim here is that nothing is shown which indicates that a strict compliance with the requirements of the statute would have so operated on the cattle as to have in any manner changed their action, and this, we think, must be conceded, so far as positive and direct evidence is concerned.

A failure to give these statutory signals when approaching a crossing makes railway companies absolutely "liable for all damages which shall be sustained by any person by reason of such neglect"; such failure is also made a misdemeanor. There is nothing in the language of the statute tending to show legislative intent to restrict its operation to the human family. It may be said, and indeed it has been held in two or three states, that the sole purpose of such legislation is to advise human beings of the approach of danger. But we think the reason given for the decisions to which our attention has been called are not sound. They are based on the thought that all animal nature below man is incapable of intelligent action, and is not endowed with the sense of self-preservation or of fear. The contrary of these propositions we believe to be true. It is a matter of common observation that the attention of dumb animals is quickly attracted by any unusual noise, though at some distance, and that the approach of an unfamiliar object ordinarily holds the attention and arouses the instinct of fear and of self-preservation which all animal nature possesses. We think the statute must be construed in the light of this common knowledge, and that the legislature, by requiring this notice of the approach of trains, intended to protect as far as possible animals as well as man. This view finds support in Elliott, R. R. § 1206. In Shearman and Redfield on Negligence (5th Ed.), it is said: "Although the statutes requiring railroad companies to ring bells or sound whistles when approaching road crossings are not enacted with primary reference to cattle, yet property, as well as persons, is within their protection." Section 427. In Orcutt v. Railway Co. (Cal.) 24 Pac. 661, the court construed a statute almost identical with ours, and held that the failure to give the statutory signals when approaching a road crossing amounted to presumptive negligence. A similar statute in Indiana was held to apply to animals in Railroad Co. v. Finn (Ind. App.) 29 N. E. 790; and in Railway Co. v. Ousler (Ind. App.) 36 N. E. 290, the same court held the failure to give the statutory signals "negligence per se, and actionable in favor of one injured thereby, either in person or property." In Hohl v. Railway Co. (Minn.) 63 N. W. 742, 52 Am. St. Rep. 598, an action for killing unattended stock, the failure to give the

**Injury to Stock—  
Liability as  
Affected by Fail-  
ure to Give Stat-  
utory Crossing  
Signals.**

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statutory signals was held competent evidence of negligence on the part of the defendant. It was so held, also, in *Palmer v. Railroad Co.* (Minn.) 38 N. W. 100; *Railroad Co. v. Hembree*, 85 Ala. 481, 5 South. 173. We have held, in effect, that when the safety of persons or animals requires signals of danger, the failure to give them may be negligence, in the absence of statutory requirements. *Gates v. Railroad Co.*, 39 Iowa, 45; *Jackson v. Railroad Co.*, 36 Iowa, 451. Such is also the holding in *Eddy v. Evans*, 7 C. C. A. 129, 58 Fed. 151.

Appellant says, however, there is no evidence on which to base the instruction complained of, inasmuch as nothing was offered tending to show that the cattle would have got out of the way if the statutory signals had been given.

Same-Same.

As we have said herein there is no direct or positive evidence bearing on this subject. Neither is there any direct evidence that they would have been driven away had the cattle alarm usually given been given at this time. But it will not be contended that trains may be operated without any attempt to keep cattle from the track when they are approaching it; for it is a well-known fact that such danger signals are given when stock is approaching a passing train, and in the majority of cases with the desired effect. If this result may be obtained when given on the closer approach of the train, we think it a proper question for the jury when relating to the statutory signals; for with the location of the highway and track before it, the distance that the train could be seen, the action of the cattle, and in this particular case the fact that they had been shortly before driven from the track by a young lad who was passing there on horseback, the jury had, at least, evidence before it from which a reasonable inference might be drawn that the accident would not have happened had the statute been complied with. *Railroad Co. v. Fenn*, supra; and *Eddy v. Evans*, supra, wherein Judge Caldwell says: "The jury might well infer that, if the proper signals had been sounded when the horses were first discovered, or ought to have been discovered, the horse \* \* \* could and would have got off the track." We must not be understood as holding that this inference will in all cases be sufficient to sustain a verdict, nor is it necessary to so determine in this case, for there was no special finding, and the jury may have based its verdict on negligence in other ways; but we do hold that there was no error in giving the instruction complained of.

There is no just ground of complaint as to the sixth instruction given by the court. The particular language objected to, isolated, might be misleading and prejudicial, under the entire record; but the instruction, taken as a whole, fully, and we think fairly, covered the entire ground to which it related. The words, "or moving towards the track," were qualified by the statement that if they were doing so in a way to lead an ordi-

Same-Duty of  
Trainmen Where  
Cattle Are Seen  
near Track.

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narly prudent person to believe they "would go upon the track, and be struck by the train," etc., this would constitute negligence, etc.

The defendant asked the court to instruct as follows, which was refused: "The defendant has the right to run trains over its road at any hour of the day or night, regardless of schedules;

Same—Special  
Train—Instruc-  
tions.

and you are instructed that the fact that the train which struck these cattle was a special train is not to be considered as negligence, or as evidence of negligence, nor shall you consider it as in any manner tending to create any liability on the part of defendant, under the facts in this case." The court, on its own motion, gave in lieu thereof this instruction: "The defendant had the right to run trains over its road at any hour of the day or night, and the fact that the train in question was an extra train, or not running on schedule time, could not constitute negligence,"—which fairly, and completely enough, covered the point presented.

The petition was very short and simple, and the negligence therein charged was so unambiguous and so plainly stated that the court could not well make it more intelligible or shorter by reforming it. Under such circumstances, it is not error to recite the pleadings, nor to refer to them, as was done in the instructions. There could have been no misunderstanding of the issues as stated by the court. The judgment is affirmed. Affirmed.

Pleading.

## CHICAGO &amp; A. R. Co.

v.

STEVENS.

(*Supreme Court of Illinois, Feb. 20, 1901.*)

[59 N. E. 577.]

**Injury to Employee—Structure near Track—Negligence—Sufficiency of Evidence.**—A railroad company for six years had used a coal shed, which stood 28½ inches from the ladders of passing freight cars, but there was a footboard, 7 feet from the ground, attached to the shed, which was only 16½ inches from such ladders. This board was used by the employee at the coal chute, but the trainmen had no connection with operating the same. Plaintiff's intestate, a brakeman, while descending a ladder on a freight car passing the coal shed, was struck by the end of the board, and thrown to the ground, receiving injuries resulting in his death. *Held*, sufficient to show that the structure was dangerous to those operating freight trains in the usual and ordinary manner, and hence the finding of the jury to that effect was sustained.

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**Same—Same—Assumption of Risk.\***—A brakeman on a freight train had been in the service of the railroad company for 28 days, and had made several trips past a coal shed, a footboard of which was 16½ inches from the ladders on the cars, and his train had stopped there at least twice to receive coal. While going from the rear of the train, at the conductor's orders, to deliver a message to the engineer, ordering a stop 2½ miles up the road, and in descending a ladder on one of the freight cars to reach a flat car immediately ahead, he was struck by the footboard of the coal shed, which they were passing, and knocked to the ground, receiving injuries resulting in his death. A company rule required employees to descend the ladders on the side of the cars opposite such structures, but the ladder on the opposite side of this car was at the rear end, and therefore could not be used. *Held*, sufficient to support a finding that the plaintiff's intestate was not chargeable with knowledge of the danger which he incurred, and hence a recovery was not precluded by the doctrine of assumption of risk.

Appeal from appellate court, Third district.

Action by Pearl A. Stevens, as administratrix, etc., against the Chicago & Alton Railroad Company, for negligently causing the death of plaintiff's intestate. From a judgment of the appellate court (91 Ill. App. 171) affirming the judgment in favor of the plaintiff, defendant appeals. Affirmed.

Scofield & Brown, for appellant.

Kerrick & Bracken, for appellee.

Wilkin, J. This is an appeal from a judgment of the appellate court affirming a judgment of the circuit court of McLean county for \$2,471.42 in favor of appellee against appellant. The action is for negligently causing the death of plaintiff's intestate. The wrongful and negligent act of the defendant alleged to have caused the injury is charged in the declaration as follows: "That the defendant had or had permitted to be erected on the east side of its tracks a certain coal chute or structure for conducting to or emptying coal into its cars and engines, and that said coal chute or structure was not placed and erected at a sufficient distance from defendant's tracks and trains passing thereon so that persons operating said trains could safely perform their duties in said work while passing over and upon said railroad at said place; that said coal chute or structure standing so near the track was highly dangerous to the servants of said road in operating its trains thereon while performing their ordinary duties." This negligence is charged, in different forms of language, in several counts of the declaration. It is also averred that plaintiff's intestate was, on August 30, 1897, a brakeman in the employ of the defendant, and was then and there engaged in assisting in the operation and running of a

\*See *Wood v. Louisville & N. R. Co.* (Tenn.), 11 Am. & Eng. R. Cas., N. S., 525, and extensive note, 531 *et seq.*

## Chicago &amp; A. R. Co. v. Stevens

freight train of the defendant, and that, while exercising due care and caution for his own safety, while said freight train was in motion was struck by said coal chute or structure, and thrown from the said train to the ground with great force and violence, and shortly afterwards died.

After the introduction of all the evidence offered upon the trial, the defendant requested the court to instruct the jury to return a verdict of not guilty in its favor, which instruction was refused, and the only ground of reversal insisted upon in this court is that refusal. It is not claimed that any error was committed by the trial court in the admission or exclusion of evidence, or in the giving, refusing, or modifying of instructions, but the sole contention is that the evidence wholly fails to prove, or fairly tends to prove, the material allegations of the plaintiff's declaration, and therefore the peremptory instruction should have been given as requested by the defendant.

Whether the plaintiff has made out a case by a preponderance of the evidence is a question of fact, and is conclusively settled by the decision of the trial and appellate courts. Whether there is any evidence fairly tending to establish the case, on a proper motion by the defendant at the trial, becomes a question of law, reviewable in this court. This proposition is conceded by counsel for appellant, although the argument, in some respects, seems to proceed upon a different theory. The undisputed evidence is that at the place of the injury, about one-half mile north of Tallula station, a coal chute had been maintained on the east side of the defendant's track for about six years. The main part of the structure was 28½ inches east of the ladder of passing freight trains, but there was a footboard attached thereto, some 7 feet from the ground, extending towards the track, which was 12 inches wide, and the outer edge being only 16½ inches from such ladders. Some of the witnesses called this a "runningboard" and others a "footboard," its use being for the employees of the coal company to stand upon when operating the chute to deliver coal to the engines of the defendant, and there is no evidence tending to prove that the trainmen had any connection whatever with operating the coal chute. At the time of the accident the deceased was descending a ladder in the ordinary and usual manner, and was struck about the hips by the projecting board above described, and thrown from the ladder to the ground, receiving injuries which resulted in his death.

That these facts fairly tend to show that the structure was so near to the railroad track as to render it dangerous to those operating freight trains in the usual and ordinary manner cannot, we think, be seriously questioned. In fact, we are at a loss to perceive how, under the proof in this record, it can be said that the evidence does not fairly establish that fact. The accident itself certainly tends to prove it. The burden of the

Injury to Em-  
ployee—Structure  
near Track—  
Negligence—Suffi-  
ciency of Evi-  
dence.

argument of counsel for appellant is upon the question whether the evidence proves, or fairly tends to prove, the other material allegation of the declaration, that the deceased was himself, at the time he received his injury, in the exercise of due care. He had been in the service of the defendant company as a head brakeman on freight trains 28 days, and had made several trips, passing the coal chute where he was injured, his train stopping twice, or, as contended by defendant, oftener, to take coal. In the forenoon of August 30, 1897, the conductor of the train on the platform at Tallula station, after the train was in motion, going northward, gave him a message to be delivered to the engineer to stop the train at Five Points, the next station, about  $2\frac{1}{2}$  miles north, for the purpose of unloading a car of cinders. He at once climbed to the top of the rear car, and went forward to the front of it, where he attempted to descend the ladder in order to reach a flat car next to the box car between it and the engine, when he was struck as above stated.

There was offered in evidence a rule of the company which counsel for appellant insist made it the duty of employees of the company operating freight trains to descend upon ladders on the opposite side of the cars from coal chutes; but it is not claimed that the deceased in this case could have complied with that rule as construed, and performed the duty of carrying the message to the engineer, the ladder on the opposite side of the box car being at the rear end, and, of course, so removed from the flat car that the latter could not be reached by it. We do not understand counsel to claim that the deceased was not, at the time of his injury, in the performance of a duty in attempting to obey the order of his conductor, or that he was not in the exercise of ordinary care in so doing, except in that he descended the ladder at a time when he was liable to come in contact with the coal chute; but the position is that he knew, or was chargeable with knowledge of the fact, that to descend the car when opposite the structure was dangerous. It is true that the evidence shows that immediately before descending the ladder he recognized and waved his hand to a young lady near the track, or, as appellant claims he himself admitted, was fooling with a girl. While that testimony might tend to show that he was not giving attention to his duty, or that he was negligent in that regard, it certainly could not be claimed, and we do not understand that it is contended, that that fact would, as a matter of law, establish negligence. In fact, we think that testimony, fairly understood, proved little or nothing. There is no evidence whatever in the record to the effect that he actually had knowledge of such danger, but the insistence seems to be that from the fact that he had frequently passed the chute, and that his trains had stopped there for coal twice or oftener, and from the fact that the rules of the company required employees to descend ladders on freight trains oppo-

~~Same-Same-~~  
~~Assumption of~~  
~~Risk.~~



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site such structures, he must be chargeable with knowledge of the danger which he incurred.

Appellant relies upon the rule that where a railroad employee continues to work with machinery provided for him by his employer after he has knowledge of its defects, or to work in a place which he knows to be dangerous, and receives an injury because of such defective machinery, or because of the dangerous character of the place, he cannot recover. In the application of this rule the material consideration is, did the employee have knowledge of the danger, or was he, under all the facts and circumstances of the case, chargeable with knowledge of such danger? And this is necessarily a question of fact to be determined from the proofs. No presumption of such knowledge can be indulged. If it be conceded that there was evidence before the jury, in this case, from which they might reasonably have found that deceased knew, or ought to have known, of the dangerous proximity of the structure to the ladders upon freight cars, still it cannot, from that evidence, be said that he was chargeable with such knowledge as a matter of law. The length of time he had been in the service of the company, the number of times he had passed the place, the number of times his trains had stopped there for the purpose of taking coal, and the rule of the company, were all facts and circumstances tending to charge him with the knowledge. The fact he was in the performance of a duty which required promptness in reaching the engineer, the facilities afforded him for accomplishing that purpose, the nature of his duties as a brakeman in passing the place, and the fact that he had nothing to do with the use of the coal chute in taking coal when trains stopped there for that purpose, were facts and circumstances proper to be considered by the jury, tending to prove that he did not know and was not chargeable with knowledge of the danger. It is impossible for us to say, upon all this evidence, that he was or was not so chargeable. That was the province of the jury in the first instance, subject only to the review by the appellate court. The judgment of the appellate court will be affirmed. Judgment affirmed.

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MAYSVILLE & B. S. R. Co. *et al.*

*v.*

BALL *et al.*

(*Court of Appeals of Kentucky, March 29, 1900.*)

[56 S. W. 188.]

Construction of Railroad—Injury to Abutting Property—Enforcement of Judgment—Defenses—Grant of Right of Way.—A contract whereby the obligors undertook to furnish and cause to be conveyed to a railroad

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company suitable rights of way for its line of railroad between designated points constitutes no defense to the enforcement of a judgment for damages in favor of one of the obligors on account of interference with the access to his property, and of the throwing of soot and cinders thereon by reason of the construction of the railroad through his land, as the defense, if available at all, should have been pleaded in the action in which the judgment was rendered.

**Same—Grant of Right of Way.**—A contract to furnish a railroad company with a right of way of the "width" already designated by its engineer does not relieve the company of the obligation to pay for the obligor's property outside the right of way which has been taken by so constructing and operating the road on the right of way as to interfere with his easement of access, and to injure his buildings.

**Constitutionality of Statute under Which Service of Process on Operator of Railroad Is Sufficient.**—The amendment to Civ. Code Prac. § 51, providing that service of summons on the person or corporation controlling or operating a railroad shall be treated as service on the defendant corporation owning or constructing the railroad, where summons cannot be served on such defendant, and that the appearance of the defendant for the purpose of moving for the quashal of the service of summons shall operate as an appearance for all purposes, is not unconstitutional.

**Entry of Appearance.**—Under that amendment a special entry of appearance by defendant corporation for the purpose of objecting to the jurisdiction of the court, which could have had reference to nothing but the sufficiency of the sheriff's return on the summons, was an entry of appearance for all purposes.

**Enforcement of Domestic Judgment—Defenses—Failure to Serve Process.**—It constitutes no defense to an action to enforce a domestic judgment that the defendant was not served with process and did not appear, unless that fact appears in the record; and the answer must allege that the fact does so appear.

Appeal from circuit court, Mason county.

"To be officially reported."

Action by W. W. Ball and others against the Maysville & Big Sandy Railroad Company and others to enforce certain judgments. Judgment for plaintiffs, and defendants appeal. Affirmed.

Wadsworth & Cochran, for appellants.

Garrett S. Wall, E. L. Worthington, and L. W. Robertson, for appellees.

Paynter, J. This case was before this court on a former appeal, and the opinion delivered is found in 43 S. W. 731. The purpose of this action is to enforce a judgment which W.

**Case Stated.** W. Ball recovered against the Maysville & Big Sandy Railroad Company, and one recovered by Boyd and wife and one by Nelson and wife against the same. The defense to the enforcement of each judgment differs some-

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what,—especially as to the defense of the Ball judgment. We will consider the questions raised by the defenses interposed on these several judgments.

## Ball Judgment.

The appellant constructed its line of railway along a street in the city of Maysville, by the property of Ball; and he claims that his property was damaged by reason of the interference with his easement of access, and by injuring his property by throwing soot and cinders on it, etc. For the damages thus resulting, he recovered judgment. By the previous opinion of the court, we adjudged that it was a taking of his property. The appellant filed an answer, which is designated as a "counterclaim"; and, so far as it is necessary to give them, the facts averred are as follows: That before the doing of the acts of which Ball complained in his suit to recover the judgment which he now seeks to enforce, to wit, on the 29th of April, 1886, he, together with a number of gentlemen, entered into a contract with the Maysville & Big Sandy Railroad Company to furnish and provide, and cause to be conveyed to it, suitable rights of way for its line of railroad from its present tracks at Ashland, in the state of Kentucky, to the eastern boundary line of Campbell county, in this state,—such right of way to be on the line designated by its engineer therefor, except so far as the right of way had been secured and paid for,—and that the right of way which they agreed to furnish was to be of the width already located and designated by its engineer. Ball's property which was taken was situated on that part of the proposed line of railway, the right of way for which he and his co-obligors agreed to furnish, provide, and have conveyed to the railroad company. It is contended for appellant that, under the contract which Ball entered into, he was bound to furnish the property for the taking of which he recovered judgment; and it resists the enforcement of the judgment on the grounds of this contract, claiming that it is now available to prevent the enforcement of the judgment. For Ball it is insisted that if the contract imposed the obligation to furnish the property which was taken from him, or to pay the damage which resulted to him by reason of the construction and prudent operation of the road, it was available as a defense to his action, and, not having pleaded it as a defense, it cannot now be done. For the purpose of considering this question, we will assume that the contract which Ball and his associates entered into released the railroad company from the payment of the damages which he recovered. Of course, it is upon this theory that the appellant seeks to plead that contract as a defense to Ball's right to enforce the judgment.

It is insisted by counsel for appellant that the contract which Ball and others entered into was not an executed conveyance of the right of way over any property, corporeal or incorporeal,

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that they or either of them owned, upon which the line of railway was or might be located, and also that it was not an executory agreement upon their part to convey such right of way to the appellant. It is argued that if it was an executed conveyance, or an executory agreement to convey, it was either a gift or a sale, and, if a sale, there was a certain purchase price for it, and that there was nothing in the contract which indicates that it was either a sale or a gift. It is said that, if the contract was a conveyance of the right of way over Ball's incorporeal property, such conveyance might have been pleaded as a defense to Ball's common-law action for damages, and it would be too late now to set it up. It is likewise admitted that the same result would follow if it was an executed agreement to part with the right of way over the property of the guarantors. The contract relied upon, executed by Ball and others, shows that the right of way was not to be a gift by them to the railroad company. On the contrary, the consideration for securing the right of way was that the company obligated itself to construct a line of railway between the points designated in the contract; and the further consideration was that the company was to issue to them stock to the amount which the various counties, cities, and towns along the line of railway expended in aid of furnishing the right of way, which they obligated themselves to do. For the undertaking of the guarantors to furnish and provide, and cause to be conveyed to the railroad company, there was assumed by the parties to the contract to be a full consideration. The contract of Ball and others did not in terms say that those of the guarantors who owned property along the line of the road, which would be necessary to be taken for a right of way, should convey it. Still, they obligated themselves to provide, furnish, and have conveyed the right of way, which necessarily included that which was necessary to be taken through their own lands. If the railroad company compelled them to acquire it from some one else, and have it conveyed to it, why could not the railroad compel one of the guarantors to convey to it a right of way over his own land? Their obligation, as expressed in the contract, is joint and several,—to furnish the right of way wherever the engineer designated it. The right of eminent domain compels every citizen, for proper compensation, to give up his property to public use. The right of the railroad company existed to take the property of Ball, if it was necessary in the construction of the road. In the absence of a contract, the law gave the railroad company the right to take it, by making proper compensation; but, instead of the railroad company relying upon the right of eminent domain to secure this right of way when it reached the property of Ball, it had in its possession a contract of Ball, by which he agreed to provide, furnish, and have conveyed to the company, a right of way which included his own property. If the contract was enforceable against the guarantors, as it is claimed

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to be by counsel for appellant, there was an obligation upon Ball to see that the identical property in controversy was to be conveyed to the railroad company. This position is assailed by the appellant, and, to do so, the mutual interest of the guarantors is urged as a reason why it is not a proper conclusion. The appellant had no concern in the settlement of the rights between the guarantors. It was careful to have stated in the contract that they were bound jointly and severally on the undertaking. It is suggested that, in order to enable the guarantors to comply with the contract on their part, it was necessary for them to agree with each owner of property, corporeal or incorporeal, over which the right of way was located, for the conveyance thereof, and to comply with the terms of the agreement, and secure execution and delivery of the conveyance; and this construction of the contract and its effect is necessary in order to preserve absolute equality among all the guarantors, and to place them all upon an equal footing. The mutual obligations of the guarantors to each other, whether by the terms of the writing, or such as are implied by law, cannot be considered in this controversy between one of the guarantors and the railroad company. Regardless of any obligation that was upon the part of the co-guarantors, the officers of the railroad company could have said to him when they reached his property in the construction of the road, "If you have not been paid for your property by your co-guarantors, we are not concerned about that, because you obligated yourself individually that you would provide, furnish, and have conveyed to our company, this right of way;" and, in our opinion, a court of equity would have enforced the contract. However, it is not necessary to take this view of the case in order to reject the claim of the defendant to the right to prevent the collection of this judgment by reason of the contract. This right of way was secured over the streets of the city of Maysville by the action of the proper authorities of that city. Under the adjudications of this court, and as cited in the previous opinion delivered in this case, and the reaffirmation of that principle, Ball could not have maintained an action for damages to his property until the road was completed. Neither could he have enjoined the railroad company from constructing its road along that street. So under the law the company was entitled to take exactly what it did, and Ball was compelled to await its action in the completion and the putting in operation the road, before he could tell the extent of his damages. He then brought suit to recover the damages which resulted from the taking of his property. If Ball's contract obligated him to furnish that which was taken by the railroad company, then, when he sued for the alleged damages resulting therefrom, the railroad company could have interposed the plea that he had not been injured, and had no right to recover, because he had agreed to furnish to the railroad company the very thing

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which he claimed produced his damage when it was taken. If Ball's contract to the company makes him liable to the defendant for the amount of the judgment which he recovered against it, it is because his contract obligated him to furnish the very thing for the taking of which he recovered damages. The amount of the damages had been ascertained by the judgment, and it is now claimed that, by reason of that contract to furnish the property taken, it is available as a defense to the judgment. The defense here presented existed when the judgment was recovered, as the contract had been executed previous thereto. It is against reason to say that the judgment should not be enforced because of this contract, as by its terms Ball was bound to furnish the thing for the taking of which he recovered damages, and at the same time to say that that contract would not have been available as a defense to the action in which he sought to recover the damages for taking it.

It has been suggested that the contract which Ball had with the company was not enforceable until the amount of his claim was ascertained by a suit for damages. If its terms deprive Ball of the right to collect anything from the railroad company for the injury he received, it is folly to say that the amount of his injury should be ascertained. If he is not entitled to collect the judgment, by reason of his contract with the company, he never had any enforceable claim against it, and was not entitled to have any amount fixed. It is wholly immaterial to the appellant whether Ball could compel his co-obligors to contribute to his loss. Its claim of right to plead this contract as a defense to the judgment, thus making Ball pay the entire amount, shows that it has no consideration for or interest in Ball's claim against his co-obligors. Therefore an argument which is made based upon a desire to regard Ball's rights in a settlement of matters between him and his co-obligors comes without any force, nor is it applicable to the issue between him and appellant. Whenever there is a breach of the covenants of a contract, a cause of action arises. When the railroad company constructed its tracks along the street in close proximity to Ball's property (if the guarantors were by their contract to furnish the property, for the taking of which Ball received judgment), then there was a breach of the contract upon the part of the guarantors for their failure to furnish the property taken from Ball, and therefore a cause of action had accrued to the railroad company against them jointly and severally. So when Ball instituted his action to recover damages the railroad company's alleged cause of action existed against him then as now. The judgment did not add to its cause of action, because it has not been paid. If by reason of such contract he is not entitled to collect his judgment, then for the same reason he was not entitled to recover it. Therefore the contract was a defense to the action for damages. In treating of defenses to actions on

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judgments, Chitty on Pleadings (volume 1, p. 486) says, "No matter of defense can be pleaded which existed anterior to the recovery of the judgment." The same rule is recognized in 2 Black, Judgm. § 754, wherein it is said: "It is a general rule that a valid judgment for the plaintiff definitely and finally negatives every defense that might and should have been raised against the action; and this is true, not only with respect to further or supplementary proceedings in the same cause, but for the purposes of every subsequent suit between the same parties, whether founded upon the same or a different cause of action. A party cannot relitigate matters which he might have interposed, but failed to do, in a prior action between the same parties or their privies in reference to the same subject-matter." In *Hill v. Lancaster*, 88 Ky. 338, 11 S. W. 74, this court said: "To allow a defendant to split his defenses, relying upon one until judgment is rendered upon it against him, and at the next term open the judgment and plead another defense, and so on, would be a mockery of legal justice. Therefore it is a universal rule that the final judgment of a court of competent jurisdiction is not only conclusive of all issues actually decided, but of all that might and should have been decided by it." Did Ball's guaranty obligate him to do more than to have him convey or have conveyed to the appellant a right of way of the "width already located and designated" by the appellant's engineer? It is said in *Joy v. St. Louis*, 138 U. S. 44, 11 Sup. Ct. 243, 34 L. Ed. 843: "Now, the term 'right of way' has a twofold signification. It sometimes is used to describe a right belonging to a party,—a right of passage over any track; and it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed." This definition of "right of way" was recognized as being correct in *New Mexico v. United States Trust Co.*, 172 U. S. 181, 19 Sup. Ct. 128, 43 L. Ed. 407. In our opinion, the language used in the contract indicates that the guarantors only obligated themselves to have conveyed to the railroad company the strip of the width designated by the engineer of the appellant. It excludes the idea that they were to be responsible for property that might be taken outside of the right of way by the railroad company. Ball's claim was not that they had taken the right of way through his land, but that they had taken his property outside of the right of way, by constructing and operating the road on the right of way so as to interfere with his easement of access, and by jarring and injuring his buildings, etc.

## Boyd and Nelson Judgments.

The Maysville & Big Sandy Railroad Company leased its line of road to the Chesapeake & Ohio Railroad Company, the latter company being in possession of the road at the time Boyd and Nelson instituted their actions. Their property

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was situated along the line of the Maysville & Big Sandy Railroad Company, and they sought to recover damages for the same cause for which Ball recovered judgment. The judgments which they each recovered are attacked collaterally in this proceeding. The averments of the Maysville & Big Sandy Railroad Company's answer in regard to these two judgments are as follows, to wit: "The defendant, the Maysville & Big Sandy Railroad Company, comes, and for further defense to the plaintiff's petition states that the judgments set forth therein, in favor of the plaintiffs James N. Boyd and Josephine Boyd, his wife, and also the judgments set forth therein in favor of the plaintiffs Jennie T. Nelson and her husband, Frank Nelson, Bird Franklin and husband, H. F. Franklin, Elizabeth Weare and husband, Nathan Weare, are null and void, because the defendant was not served with process in the actions wherein said judgments were rendered, nor did it directly or indirectly, in any manner whatever, enter its appearance to either of said actions. It states that a summons issued in each of said actions against this defendant, and upon each of said summonses the sheriff of Mason county, to whom same were directed, made the following return, to wit: 'I executed the within summons on the within-named defendant, Maysville and Big Sandy Railroad Company, on September 23, 1890, by delivering on said date in Maysville, Kentucky, a true copy thereof to F. C. Janowitz, chief agent in Mason county of the Chesapeake & Ohio Railroad Company, which latter corporation at the time, and ever since said summons came to my hands, was controlling and operating the line of railway in Mason county that was built and constructed and was owned by the defendant, Maysville & Big Sandy Railroad Company, which latter corporation has had since this summons came to my hands no officer or agent in Mason county known to me, or that I have been able to find or hear of after diligent inquiry, and which, therefore, cannot be served with process in Mason county under the law as it stood prior to the amendment to section 51 of the Code of Practice, approved May 10, 1890. John W. Alexander, S. M. C.' This was the only return upon said summons, and there was no other summons issued in said actions than these upon which said returns were so made. Nor was there any other service of process upon this defendant than as stated in said returns in either of said actions. Nor was it made to appear in either of said actions, by affidavit or any other manner, that this defendant had no officer or agent in the state of Kentucky, outside of Mason county, upon whom service could be served, under section 51 of the Code, prior to said amendment; and such was not the case. They therefore charge and aver that said judgments are null and void, and of no validity whatsoever, and all subsequent proceedings thereunder were and are null and void."

Before the institution of these suits the legislature passed



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an act amendatory to section 51, Civ. Code Prac.; the first section of that act being as follows: "Where the defendant corporation is the owner or the lessee of a railway in this state, or the builder or constructor of a railway in this state, and cannot be served with summons under the existing laws, then the person or corporation controlling or operating the railway so owned or built or constructed shall be treated as the representative of the defendant, and service of summons upon such of the officers or agents of the persons or corporation operating or controlling the railway as would be required if such controller or operator were the party sued, shall be a sufficient service of summons upon the defendant to the action; but such service must be twenty days before the commencement of the term, and the facts authorizing the same must be made to appear by the return of the officer or the affidavit of some person other than the plaintiff in the action, and the appearance of the defendant to move for the quashal of the service of the summons shall operate as an appearance for all the purposes of the action, and the same shall stand for trial at the succeeding term of the court, in case the motion to quash shall prevail." Laws 1889-90, p. 135. The service of summonses in the Boyd and Nelson cases were made by Alexander, and the return he made therein was in the language above quoted. The return was made in an effort to comply with the amendment of the Civil Code of Practice, to which we have referred. Before entering into a discussion of the questions raised, it may be added that the amendatory act is constitutional. Railroad Co. v. Shofstall (Ky.) 24 S. W. 1068. An act of substantially the same import, of the Texas legislature, was adjudged to be constitutional in York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604, and Kauffman v. Wootters, 138 U. S. 285, 11 Sup. Ct. 298, 34 L. Ed. 962.

The proceedings in court, after the return of the summonses, differ materially in the Boyd and Nelson cases, and part of the judgment in the Boyd case is in the following language: "The court, having fully considered the defendant's objections to the jurisdiction of the court in this action, overrules the same, to which the defendant objects and excepts. The defendant moved the court for leave to withdraw its special entry of appearance herein, to which the plaintiffs objected. The court, having considered the defendant's said motion, sustained the same, and allowed it to be withdrawn, to which the plaintiffs excepted." The language indicates that the defendant objected to the jurisdiction of the court generally, but, as the defendant then asked leave to withdraw what was denominated a "special entry of appearance," it is presumed that the court below understood it to be a special entry of appearance. The object of the action was to recover damages to real estate, and the venue of the action was in the Mason circuit court. The

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Maysville & Big Sandy Railroad Company was a corporation organized under the laws of this state. So it was an action by a citizen of this state against a citizen of the state, and in the court having jurisdiction of the subject of the action. Therefore this special entry of appearance could have had no reference to the jurisdiction of the court as to the subject of the action. The objection could not have been to the jurisdiction of the Mason circuit court to try the action, nor could any question have been raised that the Maysville & Big Sandy Railroad Company could not have been sued in the Mason circuit court by the plaintiff. The objection went to the jurisdiction of the person, and the motion could have had reference to nothing except the sufficiency of the return of the sheriff on the summons. The purpose of the motion was to quash the return of the sheriff on the summons, without expressly stating on the record that that was the purpose of it. If they had moved to quash the service of the summons, under the act which is amendatory of section 51, Civ. Code Prac., it would have operated as an appearance for all the purposes of the action. It was an effort to evade the effect of the statute simply by the form of the motion. In our opinion, this could not be done. It must be regarded as a motion to quash the service of the summons. The court passed upon the jurisdictional question raised, and adjudged that it had jurisdiction of the appellant; and if the return of the summons did not comply with the law, so as to bring it before the court, its motion did do so, and the court had jurisdiction of the subject of the action and of it. In the case of *York v. State*, 73 Tex. 651, 11 S. W. 869, in passing upon substantially the same question as is here for consideration, the court said: "The appearance of appellant, though by plea, was only to have an adjudication of the insufficiency of the process and service through which he was sought to be brought into court, to give the court jurisdiction over his person. Whether this question be raised by motion or plea, the appearance is for the same purpose and of the same character, and must be given the same effect. In the one case, as in the other, the appearance is made for the sole purpose of questioning the jurisdiction of the court over the person of the defendant." In *York v. Texas*, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604, the supreme court of the United States affirmed the judgment of the Texas court. It is useless to discuss the question as to the effect of the appellant's effort to withdraw his special entry of appearance, in the face of the constitutional statute declaring that, when such entry of appearance is made, the defendant is before the court for all purposes of the action. It is claimed the Nelson judgment is void, upon the ground that the defendant had not been served with process in the action in which the judgment was rendered. The attack on the judgment is not direct, but collateral. It is a well-settled rule that domestic judgments rendered in a court of general jurisdiction cannot be col-

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laterally attacked unless the want of jurisdiction appears upon the record. Therefore no evidence is admissible except that which is furnished by the record of the action wherein the judgment was rendered. Of course, the rule is otherwise when a direct attack is made upon a judgment. The answer that the defendant was not served with process, and did not appear in the action, etc., is insufficient, because it also should have alleged that the record shows such to be the case. In *Van Fleet on Collateral Attack* (section 855) it is said: "An answer to an action on a domestic judgment, where special pleading is required or attempted, must not only deny service and appearance, but must allege what the record shows or fails to show on these points. \* \* \* Hence an answer to an action on the record of any court must allege that it does not show any service or appearance, and, if the record is that of a superior court, it must allege that it affirmatively shows a want of service." 1 Black, Judgm. § 271, announces the same doctrine, wherein it is said: "When a party seeks in a collateral action to impeach the judgment or decree of a court of superior jurisdiction on the ground that he had no legal notice of the pendency of the action, it is necessary that he should allege in his pleading what, if anything, is shown by the record in relation to the issue and service of process, because, unless the record itself shows that the court never acquired jurisdiction of him, it will be conclusively presumed that the jurisdiction did attach."

Action is not taken upon the contempt proceedings, but the question is reserved for future action of the court. The judgment is affirmed.

## NEVILLE

v.

ST. LOUIS M. B. T. RY. CO.

*(Supreme Court of Missouri, Nov. 12, 1900.)*

[59 S. W. 123.]

**Railroads—Passenger's Negligence—Injuries.**—Deceased was assisting in a shipment of cattle, and when the train was taken charge of by defendant the caboose was taken off, compelling deceased and others to ride on top of the cars. It was early in the morning, and quite dark, and as the train entered the stock yards it slowed up, to allow the conductor to enter the office and get orders. Almost immediately after the conductor signaled to go ahead deceased fell from the train while attempting to walk from one car to another. The train was running very slowly and smoothly, and there was no unusual jolt or jerk. *Held*, that deceased assumed the risk in stepping from one car to the other.

Appeal from St. Louis circuit court; John A. Talty, Judge.

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Action by William C. Neville, for the benefit of the next of kin of Eugene Neville, deceased, against the St. Louis Merchants' Bridge Terminal Railway Company, to recover for the death of deceased. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action for damages for personal injuries, resulting in death, to Eugene Neville, a minor, 16 years old, at the National Stock Yards, in East St. Louis, Ill. The suit is brought by the father of the deceased for the benefit of the next of kin. The Illinois statutes create a liability whenever the death of a person is caused by the wrongful act, neglect, or default of another in all cases where the party injured might sue if the injury had not resulted in death, and permit the action to be maintained in the name of the personal representative of the deceased for the exclusive benefit of the widow and next of kin of the deceased. Sections 1, 2, c. 70, Rev. St. Ill. The laws of Missouri (Acts 1891, p. 68) provide that whenever any cause of action has accrued by virtue of the laws of any other state, and the person entitled to maintain such action in such other state is not entitled to maintain the action under the laws of this state, the court shall appoint a person to maintain the action for the benefit of the persons entitled to the proceeds under the laws of such other state. Accordingly the circuit court appointed the father of the deceased to maintain this action for the benefit of the father, brothers, and sisters of the deceased, the mother being dead. The petition charges three acts of negligence and wrongful conduct: First, failure to provide a caboose car to its freight train on which deceased was a passenger; second, forcing the deceased to take a position of great danger, to wit, to ride on the top of the freight cars; and, third, so carelessly and negligently managing and running its train that, by careless and negligent jolting of the cars, the deceased was thrown from the top of the cars, and run over, and injured so that he died. The answer is a general denial, and plea of contributory negligence.

The trial developed these facts:

The deceased, Eugene Neville, was a minor, not quite 17 years of age. On October 16, 1895, Sayers Bros. & Hayes shipped 10 cars, loaded with cattle, from Adair, Indian Territory, to St. Louis, over the Missouri, Kansas & Texas Railroad. Neville accompanied W. T. Sayers and his drover, W. H. Cain, to assist in looking after the cattle. They rode in a caboose, attached to the train, until they reached the terminus of the Missouri, Kansas & Texas Railroad in North St. Louis. There the caboose was detached from the train, and the cars containing the cattle were turned over to the defendant, to be carried, with ten other cars, to the National Stock Yards, in East St. Louis, Ill. Some one, it does not appear who, or, if so, by what authority he acted, told them

to get on the top of the freight cars; but Sayers and Cain got the top of the cars, and the deceased followed them. There was no other place provided for them to ride. When the train reached the National Stock Yards the engineer shut off the steam, and the train ran by its momentum, very smoothly and slowly, not half as fast as a man could walk. Cain got down off of the train, while Sayers and Neville remained on the top of the cars. The conductor went into the office, and exhibited his waybills to the agent, and was told by him to set his first car at chute 18. What then occurred is best told by the testimony of the several witnesses.

W. T. Sayers, plaintiff's witness, testified: "Q. How did you get from St. Louis to the National Stock Yards? A. Rode on top of the cattle car. Q. Who rode on the top of the cattle car with you? A. W. H. Cain, young Neville, and myself. Q. What became of Eugene Neville? A. He fell from the train. Q. Where were you at the time? A. In East St. Louis National Stock Yards. Q. What was the result? A. Death. Q. Was he (Neville) in the act of stooping to get down when he fell, or did he just walk right off the train? A. He did not make any effort, as I saw, to get off the train. He simply walked off. Q. Did you see what Mr. Neville was doing when he fell? A. Yes; he was in the act of getting down from the train. Q. Had the train stopped? A. No, sir. Q. Were you walking with him? A. No, sir. Q. Where were you at the time he fell, with reference to the center of the car? A. I was near the center of the car. Q. At what speed would you say the train was moving at that time? A. Very slow. Q. It had almost stopped, had it not? A. It had. Q. And it was then at the National Stock Yards, in East St. Louis? A. It was in the National Stock Yards, in East St. Louis. Q. In what space did the train stop? A. In a very short space. Q. Only one truck struck him,—was that right? A. He walked off the front part of the car in the direction the train was going, and was picked up near the rear end of the car he fell from. Q. What effort was made by the train to stop? A. The train had stopped. It was in the act of stopping when he fell. Q. Was the train being operated smoothly, do you know? A. It was. Q. Mr. Sayers, how was the train being operated at the time of the accident? A. It was smooth and good,—operated well. Q. Had it stopped before the accident? A. I don't think it had. Q. You had been and were at the time of the accident riding with Mr. Neville on the top of the car, the front trucks of which ran over him? A. Yes, sir. Q. Please state just exactly what he did from the time he left you on the car until the accident. A. He walked away from me, is all. Q. At the time he fell from the car was there any jolting or jarring of the train? A. There was not."

W. H. Cain, plaintiff's witness, testified that when the train reached the stock yards it was running very slowly and

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smoothly; that he got down off of the cars while the train was running, and went right into the office; that he heard Sayers call, and he ran back to the train, and Sayers told him that Neville had fallen between the cars; that he did not see the accident, but was in the office, about two car lengths from the place where they took Neville from under the car.

Lemuel P. Howard, plaintiff's witness, testified that he rode over to the stock yards on top of the train with Harding, Cain, Neville, and others unknown to him; that the weather was cool. "When we got to the National Stock Yards witness got off of the cars, and went into the receiving clerk's office. When he got off, the train was near to a standstill, but was in slow motion, running about as fast as a man can walk. It ran about thirty feet after he got off before it stopped. To the best of his knowledge, the train started again, but he would not be positive. About a minute after he got in the receiving office he heard some one say, 'My God! There is a man killed.' This was just after witness thought the train started again. He started to run out of the shanty, and heard Mr. Cain say the boy was killed. Then he and Mr. Harding ran over there, and found the train had been cut in two. Mr. Harding went under the car to the boy. Some one called for a board to lay him on, and he was laid on an old door, and carried into the shanty. This was done just as quick as they could,—about five minutes after the accident. When they got him into the shanty, Mr. Cain asked the boy how he came to get hurt. He said it just shook him off. He also asked if some one would telegraph to his father at Olean, Missouri. He was asked if he thought he was hurt very badly and he said, 'No, he thought he would get well.'" Cross-examined, the witness said, among other things: "The statements made by Mr. Neville were immediately after he was carried into the shanty. The distance between the shanty and the place where he was picked up was between thirty and forty feet. The car that ran over Neville was about the fifth car from the engine. The front part of the engine was about three or four car lengths past the shanty." Witness said: "I said, to the best of my remembrance and knowledge, it came to a standstill and started up again." What he heard Neville say as to the accident was said to Mr. Cain. It might have been said to some others. "He gave no other explanations as to the accident. Two wheels run over him, I think."

T. S. Martindale, plaintiff's witness, testified: "That he was receiving clerk for the National Stock Yards, October, 1895, and knew about the accident to Neville, which happened in the National Stock Yards, on the M., K. & T. train delivered to us by the Merchants' Terminal Bridge Company. It was about dawn in the morning, not later than 4 o'clock. It was dark when the train came. I was inside of the little shanty that we use, when the train pulled up,—office they call it, but it is a shanty proper. When the train pulled up, the con-

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ductor came in and delivered the bills. My duties were to examine the bills, and to see in what department the cattle were to be unloaded, and then order them unloaded,—to see that they were properly yarded, and that the bills were registered. That Joe Cullen, Tom Bayle, Paul Kid, and Mr. Ford were in the office at the time the train pulled up. The conductor came in and delivered the bills. The train stopped, and the conductor delivered me the bills, and I examined the bills, and turned around, and said to McCaffrey, 'Set your first car at chute eighteen.' He went to set the train,—probably to do so,—and the train lurched ahead, and almost immediately my man, Paul Kid, rushed in, and said there was a man down under the cars, and I grabbed my lantern, and went in the direction where he said he heard the cry of distress, and when I got there McCaffrey had the train cut in two, and had laid this young man out between the tracks 1 and 2, and I went to McCaffrey, and said, 'What is the matter here?' and he told me; and I said to the young man—asked him—how it was that he got hurt, or was it an accident, and he told me that he had got up, and walked along the train from one car to the other, and when the train went ahead he fell between.

Q. Mr. Overall: That was when you went down there to where he was lying between the tracks? A. When he was lying between the tracks; yes, sir.

Q. That was right at the place of the accident? A. Right immediately after the accident; yes, sir. \* \* \*

Then we went up to the shanty, and I think it was Ford that brought the board down,—one of the boards that the boys lay their bed on to sleep when there was nothing to do. He brought the board down, and McCaffrey and I and the other parties picked up the boy, and carried him opposite the shanty, and McCaffrey cut the train, and we carried him opposite, into the shanty," etc. The witness was asked to repeat what the boy said to him at the place of the accident, and said: "I asked him when he was lying there. He was then removed from where he was hurt, out between tracks 1 and 2, or partially removed, so he was not on the track. I asked him how he got hurt, and he told me that he got up, and walked down towards the little house or shanty, and as he went to step from one car to the other the train moved ahead, and he fell between the cars. He also said he was chilly and numb. It was rather a cool morning, and frosty." Witness further stated that the assistance of a doctor did not come to him at the stock yards; that from the time of the accident to the time Neville reached the hospital it must have been fully two hours; during that time the boy was lying in the shanty bleeding. "The car crushed over his legs about the knee. I think it was above one knee and below the other. I won't be positive, but it was about the knees somewhere that the legs were crushed. Did not examine him at all. Just picked him up and put him on the board. The boy must have been 150 or 180 feet north of the shanty. Could not tell

exactly." The witness was asked this question: "Q. Mr. Martindale, do you know where the engine was that was hauling that train at the time the cars stopped, before it lurched ahead afterwards? A. Why, I could not exactly locate it; no, sir. But it was beyond the shanty—east of the shanty—when it jerked. Q. That is on a different side of the shanty from which the boy was found? A. Yes, sir. Q. And the conductor, when he handed you those bills and received your orders to take the first car to chute eighteen, ordered the train started again? A. Yes, sir. Q. Were you in any position to know whether or not that starting caused any sudden jerk? If so, state to the jury. A. When I was there at that time, I gave him orders to set the train, and, of course, I turned my attention then to folding the bills preparatory to going out to check the train. I did not go out to see him give the signal. I did not see the train lurch ahead. I heard it; that was all. I did not see anything, because I was not outside of the shanty. Q. How long was that before you heard that a man had been hurt? A. Almost immediately one of the men came in, and told me that he heard a cry, and that there was a man hurt down there." On cross-examination he said that he did all he could do to get a physician there; that he telephoned to the police station to send an ambulance. The message was misunderstood, and they sent a buggy. Afterwards they sent an ambulance, and everything was done that could be done to get a physician. Witness stated that he did not know whether the train had exactly stopped when the conductor came in, but it stopped immediately afterwards, about that time; that he could not say that it had come to a full stop when he came in, "but it came to a full stop before I told him to go ahead"; that he could see all out of the door, and he was looking out of the door, but he could not say whether the conductor had handed him the bills and he had finished examining them at the time he looked out of the door; that at the time he saw the train stop he could not say whether they had gotten through with the preliminaries, because he could not remember such details; he must have finished examining the bills before he said anything to the conductor; that after he had looked at the top and bottom bills he told the conductor to set his car at chute 18, and he proceeded to do so.

Plaintiff's witness Joe Cullen testified that he was an employee of the National Stock Yards in October, 1895; that he knew of the accident resulting in the death of Eugene Neville; that when the train on which Eugene Neville was riding came in witness was right in the shanty where they unload cattle,—the shanty Martindale had charge of. "Q. Did the train stop when the conductor came into the office? A. Yes, sir; Mr. Martindale took the bills, and looked over them, and told him to pull up to chute eighteen,—up to the dead line. Q. What was done then? A. He went out, and started the train up, and before the train started this young man came in. He



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started to pull the train up. He was going to pull up to chute eighteen. Q. How long was that before the alarm was given after the boy was hurt? Col. Overall: He has not stated it was after. Q. Was it before or after that? A. It was before that. Q. The question is: You said the train stopped, and then started up? A. Yes, sir. Q. Was it before it started up or after it started up? A. After it started up. Q. That is what I understood you to say before. How long after? A. About five minutes, I guess." Cross-examined, he said: "Q. You say it was before Martindale told the conductor to pull up that the accident happened? A. No, sir; it was after. Q. Did you not say just now it was before? A. I said the train was pulling up when the young fellow who is working with us hollowed that some one was hurt down at the train. \* \* \* Q. Martindale told the conductor to pull up to chute eighteen? A. To the dead line,—to chute eighteen; and this young fellow hollowed that there was somebody hurt down at the train. Q. Where were you when the train came in? A. Standing right at the door. Q. Looking out? A. Yes, sir; when the train came down. Q. A little inside of the door, looking out at the train? A. Yes, sir; just even with the door. Q. You say the train came in? A. Yes, sir. Q. And it stopped? A. Yes, sir. Q. And about five minutes afterwards it started up again? A. Yes, sir; it was less than that. It was about three minutes that it took in order to look over the bills, and then Martindale told him to pull up to chute eighteen." Further cross-examination of this witness did not vary his evidence.

Plaintiff's witness Thomas Bales testified that he was in the stock yards the morning of the 19th of April, 1895, when Neville was killed; that he was in the station where Martindale held forth; that he was working for the National Stock Yards at the time, and Martindale was his foreman; was present when the train Neville was on came into the yards, standing outside of the shanty. "Q. Did you say what was done with the train there that morning? A. As near as I remember, the train pulled up. Two cars had passed the foreman's shanty,—Martindale's shanty,—and slacked up. Q. You mean stopped? A. Yes, sir; and the conductor went into the shanty. Q. And what passed between him and your foreman? A. I do not know when I was outside the shanty, but presently the conductor came outside, and the train pulled up to chute eighteen. Q. The train went forward again? A. Forward again; yes, sir." Witness further stated that the brakeman said that they had run over a man before the train pulled up to chute 18. He was cross-examined at length on this subject, and stated that, as near as he could remember, the brakeman reported the man hurt before the train pulled up to chute 18. On recross-examination he stated that, to the best of his knowledge, when the brakeman came down to the shanty it was before the train was moved after the first stop, according

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to his remembrance of the case. The witness further stated: "As I remember the case, the train stopped within two car lengths past the shanty. Q. Yes; you have stated that. A. And after the conductor took the bills in to Martindale, the receiving clerk, then the train pulled up to chute 18. Q. Yes; you have stated that. Now, was it while Martindale was examining the bills that the brakeman came up and said somebody had been hurt, or was it afterwards? A. I could not just exactly swear to that. Q. Was it before or after that? A. I could not swear to which it was." The witness repeatedly stated that he could not swear whether the train pulled up before he had heard the report; that his remembrance was not clear on the subject.

Plaintiff's witness A. P. Ford testified that he was soliciting for the National Hotel, and knew about the accident; that he was right there; that the train checked up and slacked ahead again; that he did not know why it checked there, but it checked, and slacked ahead again. It was after that he heard of the boy being hurt. "Q. Tell how long after that. A. It was but a short time."

Plaintiff's witness D. D. Hardin testified that he lived in the Indian Territory; that he remembers the cattle shipped that Eugene Neville had charge of in the fall of 1895; that he had charge of cattle in the same train,—four cars; that he came up on the Missouri, Kansas & Texas; that in North St. Louis they cut loose from the caboose, "and the railroad men said we would have to get up on top of the stock cars to go across, and they all got up on the top of the train, and went across the river. When the train came to the station it was running very slow, and I was very cold, and so got off the train before it came to a halt, to go to the fire. Went into the shanty that they speak of, and it was but a little while that I heard the report that somebody was hurt outdoors." That he did not know whether the train came to a standstill or not. He heard a noise like it stopped, but could not say it stopped. "The noise was like that of drawheads coming together and pulling apart,—pulling up the slack, I believe they call it. I heard that after I was in the house." Did not know whether or not it was before or after he heard Neville was hurt.

Charles McCaffrey, defendant's witness, testified that he was the conductor of the freight train on which Neville was injured. Stated that he was in the employ of the Merchants' Bridge Terminal Railway Company in October, 1895; that he got off the train right opposite Martindale's shanty, while the train was moving slowly; that the train went to chute 18 before it stopped; a few minutes after the train stopped at chute 18 the hind brakeman came up, and told him that a young man behind was being hurt; that there was no motion of the train after it stopped the first time. On cross-examination he stated that there were several men at the place of the accident, but he did not know who they were; that he saw

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Mr. Martindale there; that he and Martindale helped carry him in; that he heard Mr. Martindale talking to Neville, but did not hear the reply; that all he heard was that he was suffering, and he wanted a doctor; that he thought he got off of the train, and went into the station, and found Martindale there, and gave him the bills; that he (Martindale) might have told him to pull down to chute 18, but he does not recollect it. He was asked: "Q. Was the engine pulling the cars then, or had they run together? A. Well, we were all shut off, so as to give a chance to throw the switches in case they were wrong. He might have been working steam or might not. I could not say." That he saw some men on top of the cars, but could not say who they were. That he did not take up their passes, or go to see what their transportation was. He testified that the train had no caboose on; that they got the train at Madison; that they were supposed to have a caboose on when they started over at St. Louis; that they have cabooses in St. Louis; did not know whether they were in the yards or not; that they have not got cabooses enough.

William E. Bissett stated that he was the locomotive engineer having charge of the train on which young Neville was injured. On cross-examination he stated that he was then working for the Merchants' Bridge Terminal Association; that when they came into the stock yards they had to run slow on account of switches; that the track was level there. He was asked: "Q. You shut off the steam altogether, and were running by the momentum of the train? A. Yes, sir; when I get up to the pens, of course I have got to use a little steam running over the switches. After that the train moves of its own motion because the track is very level. Q. And when the steam was shut off from the engine the cars moved together by the momentum, and were pushing forward? A. Yes, sir. Q. And that was the condition of the train when it reached opposite to the station? A. Yes, sir." He stated that there was no jar in that train that morning that he knew of. He was asked: "Q. Now, suppose, as a matter of fact, the car had stopped, and the boy was walking from one end to the other, after the car had stopped, and he had stepped from the car on which he was over to the next car in front of him, and the engine started forward, what would the effect be on the boy? A. It would be apt to throw him backward, because it would jerk the car from under his feet, and, of course, he would fall backward. It would throw him back under the car. Q. But, if you had stopped, the tendency must be to throw him forward? A. Yes, sir. Q. So if he had stepped from the car on which he was to the car in front of him, and the car stopped suddenly, he would have been thrown forward on the car? A. Yes, sir. Q. But if the engine had gone forward, and he had made a move in that direction, he would be apt to fall the other way? A. Yes, sir."

Defendant's witness John P. Collins testified that he was

the fireman on the train at the time of the accident to Neville. He testified that at the time the engineer had shut off the steam, and allowed the engine to run on; that the cars should have been close together at that time; that he did not have any time to see. On cross-examination he said that he was sure the engine was not pulling the cars, but was running by the momentum of the train; that the steam had been shut off about where the stock yards foreman's shanty was, four or five car lengths from chute 18; that he is still in the employ of the Merchants' Bridge Company, and has been with them ever since the accident.

Defendant's witness John A. Silverthorn testified that he was a switchman in October, 1895, for the Merchants' Bridge Company; that he was on the train on which young Neville was injured; that he was head switchman, etc. On cross-examination he said that at the speed they were going he would not care if his little child was on top of a car; he would not be a bit alarmed about his getting hurt; that at the time the conductor got off the front of the engine the train was running at such a rate that there was no danger in any part of the train getting off of the cars; that it was perfectly easy for anybody to get off. He was asked this question: "Q. Will you please explain to the jury how, in your opinion as a railroad man, if the train was running so slow that a two year old child could have gotten off without being hurt, that a sixteen year old boy was jerked off of that train, and under it, and run over and killed? A. The only explanation I can make is that I do not know how Neville was hurt, but I emphatically say that anybody could get off that train without being hurt. That is all I have to say in regard to it, and all I could say."

Defendant's witness Michael Ratchford stated that he was a switchman of the Merchants' Bridge Company, and brakeman on the train on which Neville was killed. On cross-examination he said: "Q. Do I understand you to mean that you did not know whether there was a lurch forward or not? A. Well, if there was a very hard one, I surely would have noticed it. Q. But you did not notice it? A. No, sir. Q. You do not swear that there was no lurch forward? A. No, I do not. Q. You could not remember that at this length of time, could you? A. No, sir."

This was all the testimony of the case.

Upon this testimony, under instructions hereinafter referred to, the jury returned a verdict for the plaintiff for \$3,000, and defendant perfected its appeal.

Jno. H. Overall, for appellant.

J. B. Burkhalter and Noble & Shield, for respondent.

Marshall, J. (after stating the facts). 1. At the close of the plaintiff's case, and again at the close of the whole case, the defendant demurred to the evidence, and the court overruled

the same. This is the first error assigned. The failure of the defendant to furnish a caboose for the deceased to ride in was eliminated from the case by the circuit court, the plaintiff submitted to that ruling, and it is not open to review on this appeal. The theory upon which the plaintiff predicates a right to recover is that the train had stopped before the deceased started to get off, and that the deceased had a right then to get off, but that before he could do so, and while in the act of doing so, the train was started forward with a jerk, and without any notice or signal of intention to start, in consequence of which the deceased was thrown off, and injured so he died. This theory could only apply to the third act of negligence alleged in the petition; that is, that the defendant managed and ran its train so carelessly that, by reason of the careless and negligent jolting of the cars, the deceased was thrown from the train. The instructions asked by the plaintiff, and given by the court, follow the lines of the petition. From a reading of the petition it could not fairly be said that the pleader intended to charge the defendant with negligence in starting its train, without notice or signal, and with a jerk, in consequence of which the injury occurred. The petition rather conveys the impression that the pleader meant to charge that the jolting occurred while the train was in motion, and that the deceased was thrown off of the cars,—not while attempting to get off, but evidently and solely by reason of the jolting. The theory of the plaintiff in this court, therefore, does not appear from the petition or instructions to be the theory upon which this case was tried in the circuit court. Being thrown off of a train while in motion by the jolting and jerking of the train is a different case from being thrown off a train which has stopped, and from which the person is alighting, by reason of the sudden starting of the train without a signal and with a jerk. This difference is illustrated by the cases of *Dougherty v. Railroad Co.*, 81 Mo., loc. cit. 330; *Swigert v. Railroad*, 75 Mo., loc. cit. 481; *Straus v. Railroad Co.*, 75 Mo. 185; *Bartley v. Railroad Co.*, 148 Mo. 124, 49 S. W. 840; *Railroad Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898.

The testimony bearing upon the question whether the train was stopped, and then started without a signal and with a jerk, while the deceased was in the act of alighting, is given by plaintiff's witnesses as follows: Howard says, to the best of his remembrance and knowledge, "it came to a standstill and started again," but it was moving slowly when he got off, and when he went into the office, and he did not see the accident, and therefore could not swear how the deceased was hurt. He heard Cain ask deceased, after he was taken into the office, how he got hurt, and "he said it just shook him off." *Martindale*, the receiving clerk in the office, said he could not swear that the train had stopped before the conductor came into the office, but that it did come to a full stop before he told him to go ahead; that "I did not see the train lurch ahead; I heard it,

—that was all.” But, as he did not see the accident, he did not know whether the accident occurred before or after the train stopped and then started again; that “I asked him [deceased] how he got hurt, and he told me that he got up and walked down towards the little house or shanty, and as he went to step from one car to the other the train moved ahead and he fell between the cars.” Cullen said the train stopped, the conductor went into the office, the clerk told him to pull up to chute 18, the conductor came out of the office, and started the train up, and then the accident occurred. Bales testified that the train stopped and then started, but he could not swear whether he heard the report of the accident before or after the train started again. He did not see the accident. Ford testified that “the train checked up and slacked ahead again,” and afterwards he heard the boy was hurt. He did not see the accident. Hardin, who rode over the river on top of the train, got off the train at the office of the stock yards, while the train was moving slowly, and went into the office. Did not know whether the train came to a standstill or not. “Heard a noise like it stopped, but could not say it stopped. The noise was like that of drawheads coming together and pulling apart; ‘pulling up slack,’ I believe they call it. I heard that after I was in the house. Did not know whether or not it was before or after I heard Neville was hurt.” He did not see the accident. Sayers was the only eyewitness to the accident, and he said the train was running smoothly and slowly when the accident occurred, and had not stopped, but did stop in a very short space after the accident; that Neville was in the act of getting down from the train when he fell; that “he walked off of the front part of the car in the direction the train was going, and was picked up near the rear end of the car he fell from.” Defendant’s witnesses testified as follows: Charles McCaffrey, the conductor, said the train did not stop until it reached chute 18, and then a man told him “a young man behind was being hurt”; that “there was no motion after it stopped the first time.” Bissett, the engineer, said the train was running very slowly when it reached the office, with only enough steam on to get across the switches; that there was no jar to the train; and that the train did not stop until it reached the chute. Collins, the fireman, who was also an engineer, said the steam was shut off about at the office, and the train ran by its momentum to chute 18, which was a distance of four or five car lengths; that the train did not stop until it reached the chute. Silverthorn, the defendant’s head switchman, said that at the time the conductor got off of the train it was running so slowly that there was no danger to any one in getting off; that a two year old child could get off without being hurt; that the train had to move slowly, because of the number of switches there; that the train did not stop until it reached chute 18; that there was no jerking or jolting to the train.

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Ratchford, the rear brakeman and switchman on the train, said the train was moving very slowly and easily, with no jerking or jolting; that it never stopped until it got to the chute.

Thus it appears that Howard, Martindale, Cullen, and Bales said the train stopped and then started again, and went on to the chute, some 140 to 160 feet further, but none of these persons saw the accident, or say whether the accident occurred before or after the train stopped, or whether it was the stopping and starting of the train suddenly, and without any signal, that threw the deceased off of the car. Hardin says he heard a noise like that of drawheads coming together and pulling apart,—“taking up slack,”—but did not know whether this was before or after the accident. The deceased himself said, “as he went to step from one car to the other, the train moved ahead, and he fell between the cars”; and, again, that “it just shook him off.” Sayers, the only eyewitness, said the train did not stop, but was moving slowly, when the deceased “simply walked off”; “was in the act of getting down from the train,” and fell; “walked off the front part of the car in the direction the train was going, and was picked up near the rear end of the car he fell from.” On the other hand, McCaffrey, Bissett, Collins, Silverthorn, Ratchford, and Ford said the train did not stop until it reached the chute. Every witness testified that the train was running slowly, and was well and properly managed. All of the witnesses, except Hardin, say there was no jerk or jolt or jar, and Hardin only says that after he got inside of the office he heard “a noise like that of drawheads coming together and pulling apart,—pulling up slack”; but even he does not say this occurred before the accident or was the cause of the accident.

The result is: Four witnesses swear the train stopped and started again; one heard a noise which indicated that it stopped and then started again; but none of the five saw the accident, or could say that this occurred before or after the accident, or was the cause of the accident. The only eyewitness says the train did not stop before the accident; that the deceased simply walked off, or while in the act of getting off fell; and the deceased himself said that as he went to step from one car to another the train moved ahead, and he fell between the cars; and, again, that “it just shook him off.” Six witnesses say the train did not stop until it reached the chute, and was not started after it stopped until it was cut in two to get the deceased from under the car. There is therefore a conflict in the testimony as to whether the train stopped and started again before it was finally stopped at the chute. There is no evidence, except Hardin’s, which does not rise to the dignity of establishing the fact, that there was any unusual or unnecessary jerk or jar or jolt in stopping or starting the train, if such was done. The only evidence

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connecting the injury with the movement of the train is that of Sayers and of the deceased. If Sayers' testimony is true, the deceased simply walked off of the train, or fell off while in the act of getting off, while the train was in motion. If the statements of the deceased are true, as he went to step from one car to another, the train moved ahead, and he fell between the cars, or "it just shook him off."

It is simply incredible that a 16 year old lad would simply walk off of the top of a freight car. It is more likely that he was in the act of getting off, and fell, or, as the deceased said, he attempted to step from one car to another and fell between them. The evidence of Sayers is the only evidence in the case that the deceased was in the act of getting off, and he says the train was moving very slowly, and, if this be taken as true, the plaintiff has no case; for he took the risk of getting off of a moving train without the direction or invitation of the defendant or its servants. The whole case for the plaintiff, therefore, rests upon the probative force of the statements of the deceased. His statement that the train moved ahead as he attempted to step from one car to another contemplates the idea that when he began the attempt the train was at a standstill, and that before he completed the attempt the train moved forward, and he fell between the cars or was shaken off. The cases hereinbefore cited establish the rule that a train must stop long enough to reasonably enable a passenger to alight, and the plaintiff invokes this rule in this court, though such an idea would scarcely have been gotten from the averments of the petition. But this rule is not broad enough to warrant a recovery in this case; for, giving the fullest force to the statements of the deceased, they do not show that he was either in the act of alighting from the train, it being at rest (for he would take the risk of alighting if the train was in motion), or that he intended getting off. On the contrary, his act and statement clearly show he was not attempting to alight, but, on the contrary, he was attempting to step from one car to another. In order to alight, it was not necessary for him to do this. If this was what he was doing and attempting to do, then the rule invoked by the plaintiff has no application to this case, and the plaintiff is not entitled to recover, for there is no rule of law which would subject the defendant to liability if the deceased, without any known or good reason, attempted to step from one car to another, and fell between them, whether the cars were moving or at rest when the attempt began, and were moved, without a signal, before the attempt was completed. As before pointed out, the train was well operated, and was running smoothly and slowly, and there were no unusual or extraordinary jerks or lurches or jolts or jars, and unless there was the plaintiff is not entitled to recover if the jolt or jerk occurred while the train was in motion, as a necessary or unavoidable incident to the



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operation of the road. *Bartley v. Railroad Co.*, 148 Mo. 124, 49 S. W. 840.

The plaintiff relies strongly upon the case of *Railroad Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898. The facts in that case were these: The plaintiff, a stockman, rode in the caboose car, attached to a cattle train. When the train reached Mattoon, Ill., the caboose was detached from the train, and the plaintiff was forced to get on top of the freight car. The train then ran a half to three-quarters of a mile to pass onto a switch to take another caboose. "A brakeman on the hindmost car had a lantern in his hand. The light so dazed or blinded the plaintiff that he thought he was on the same car with the brakeman, though he was in fact near the end of the car next before it. The train, in backing on the switch, stopped before it reached the caboose which was to be attached to it. It was thereupon suddenly drawn forward to take up the slack, and then suddenly backed, producing a quick and powerful concussion, which precipitated the plaintiff between the car on which he was standing and the hindmost car." It is apparent that this case is very essentially different from the case at bar. There was no pretense in that case that the plaintiff was attempting to alight from the train, and was thrown from the train by the starting thereof without notice or signal, before he had, reasonably, time to get off. There was abundant evidence in that case of an unusual, unnecessary, and extraordinary jolt, which brings that case clearly within the rules announced in *Bartley v. Railroad Co.*, supra. But no such conditions are present in this case, but the facts and theories are quite the reverse. Hence we subscribe, as was done in the *Bartley Case*, to the doctrine of that case, but cannot apply it to the facts in this case.

There is no theory, upon the facts proved, which would justify a verdict for the plaintiff. The evidence does not justify a verdict upon the theory that the train was at rest, and the plaintiff attempted to leave it, and, before he had time to do so, the train was started without a signal, and the plaintiff was thrown off and hurt. Neither is there any substantial evidence that the defendant was guilty of any negligence in the operation of the train, nor that there was any unusual, unnecessary, or extraordinary jolt or jar or jerk, but, on the contrary, the evidence is practically uncontradicted that no such thing occurred, but that the train was running slowly and smoothly. It is clear that deceased attempted to step from one car to another while the train was in motion, or when the train was at rest, and that the train started without notice while he was in the act of so doing (it is immaterial which is the fact), and that he fell between the cars and was hurt. This is, without doubt, the proximate cause of the injury in this case. The mere being on the top of the car did not cause the accident. If he had not tried to step from one car to another, there is absolutely nothing in this record to cause a

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suspicion that he would have been hurt. There is no reason or excuse shown for his stepping from one car to the other. He took the risks incident to the act, and the plaintiff cannot recover. Inasmuch as no verdict in favor of the plaintiff could be allowed to stand in this case, the judgment is simply reversed. *Haven v. Railroad Co.* (Mo. Sup.) 55 S. W., loc. cit. 1039. All concur.

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RAILEY

v.

GARBUTT *et al.*

(*Supreme Court of Georgia, Nov. 27, 1900.*)

[37 South. 360.]

**Injury to Employee—Negligence—Burden of Proof.\***—In a suit by a servant against a master, not a railroad company, for damages alleged to have been sustained on account of the negligence of the master, the burden of proving such negligence rests upon the plaintiff, and there is a presumption that the master has discharged his duty to the servant, and is not at fault.

**Same—Liability for Negligence of Fellow Servant.**—Except in cases of railroad companies, the master is not liable to one servant for injuries arising from the negligence of another servant about the same business.

**Fellow Servants.**†—A woodcutter and a locomotive engineer in charge of a train used for the purpose of hauling timber to a sawmill and of transporting employees of their common master from the mill to their respective places of work are fellow servants.

(Syllabus by the Court.)

Error from superior court, Laurens county; John C. Hart, Judge.

Action by Church Railey against T. W. Garbutt & Co. Judgment for defendants, and plaintiff brings error. Affirmed.

Sanders & Adams, A. H. Davis, and T. L. Griner, for plaintiff in error.

A. F. Daley and W. R. Daley, for defendants in error.

Cobb, J. Railey sued Garbutt & Co., a partnership, for damages on account of personal injuries alleged to have been sustained by the negligence of the defendants. Upon the trial the following appeared to be the undisputed facts in the case: The defendants owned a sawmill, and in connection with it

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\*See *Ketterman v. Dry Fork R. Co.* (W. Va.), 19 Am. & Eng. R. Cas., N. S., 445, and *foot-note*, 446.

†See notes at end of case.

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operated a railroad for the purpose of hauling logs from the woods to their mill and of transporting their employees from their mill to the woods. Plaintiff was employed by them as a stock cutter, and was on a train of defendants, consisting of an engine, tender, and flat car, being transported to his place of work. The train was running backwards. At a point on the railroad the defendants had a switch which connected the main line of the railroad with a side track, and this switch had been left open. On the side track a number of timber trucks were standing about 10 feet from the main line. The switch was not locked or otherwise confined, and when the train reached the switch it left the main line, and ran into the side track, and, striking the trucks lying thereon, threw the plaintiff from the flat car into a ditch, from which he sustained serious injuries. The switch was never locked, and was held in position by a weight, which, when moved from left to right, changes the position of the switch. It could not be changed by the passing of a train, nor unless some one moved the weight. The plaintiff was injured on Monday, and the switch was left in its proper position on the previous Saturday evening, and no train was running on Sunday. The switch was reasonably suited to the purpose intended, and was the one generally used by sawmill men in the operation of similar lines of railroad. The evidence was conflicting as to the rate of speed at which the train was running, some of the witnesses placing the same as low as six miles an hour and others as high as twelve, while others described the rate of speed as being very fast. The court directed a verdict in favor of the defendants, and to this ruling the plaintiff excepted.

This being a suit by a servant against his master for damages on account of injuries alleged to have been sustained as a result of negligence on the part of the master, and the master not being a railroad company, within the meaning of section 2321 of the Civil Code, there is no presumption of law that the master was negligent. *White v. Kennon*, 83 Ga. 343, 345, 9 S. E. 1082; *Ellington v. Lumber Co.*, 93 Ga. 53, 19 S. E. 21. The liability of the master in such a case is to be determined by the general law relating to master and servant. Under this law it is presumed that the master has discharged his duty to his servant, and was not at fault, and it is also presumed that the servant assumed all of the usual and ordinary hazards of the business in which he was engaged. The servant has upon him the burden of proving negligence upon the part of the master, and, in order to render the master liable, he is bound to show either that the master has failed to furnish machinery suitable and proper for the business in which the servant was engaged, or has failed to observe precautions necessary to the protection of the servant in the use of machinery suited to such business. See *Railroad Co. v. Nelms*, 83 Ga. 70, 75, 9 S. E. 1049, citing *Wood, Mast. & S.* §§ 368, 382. Applying these rules to the facts of the present

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case, the plaintiff has failed to carry the burden which the law imposed upon him. He has not proven that the injury resulted from defective machinery. On the other hand, while the evidence is silent as to the character of the engine and cars, there is undisputed evidence showing that the switch was one reasonably suited to the purpose intended, and of that character which was in general use by persons engaged in a business similar to the one in which the defendants were engaged. There is no proof showing that the defendants were negligent in the way in which this switch was used. While there is evidence to the effect that the switch was not locked, or otherwise confined, there is no evidence whatever showing that in the use of such a switch ordinary prudence would have required that it be kept locked, or otherwise confined, or watched, in order that it might not be misplaced. Viewing the evidence as a whole in the most favorable light for the plaintiff, he has failed to overcome the presumption of law that his master had discharged his duty towards him, and was not at fault in regard to the matter under investigation. The plaintiff cannot predicate his right to recover upon the negligence of the engineer, on the theory that it was incumbent upon him to ascertain whether the switch was open or closed, for the reason that he and the engineer are fellow servants. See *Power Co. v. Wells* (Ga.) 35 S. E. 365; *McCosker v. Lumber Co.* (Ga.) 35 S. E. 369. The court did not err in directing a verdict in favor of the defendants. Judgment affirmed. All the justices concurring, except Lewis, J., absent for providential cause.

## NOTES.

**WHETHER TRAINMEN AND OTHER EMPLOYEES RIDING ON TRAIN ARE FELLOW SERVANTS.**

**General Rule.**—Except in jurisdictions where the different department limitation is controlling, employees other than trainmen, while riding on their employer's train, unless they are passengers, are held to be fellow servants of the trainmen. *McGill v. Southern Pac. Co.* (Ariz.), 33 Pac. Rep. 821, 44 Pac. Rep. 302; *St. Louis, etc., R. Co. v. Shackelford*, 42 Ark. 417; *Parrish v. Pensacola, etc., R. Co.*, 28 Fla. 251; *Abend v. Terre Haute, etc., R. Co.*, 111 Ill. 202, 53 Am. Rep. 616, 17 Am. & Eng. R. Cas. 614; *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305, 21 Am. & Eng. R. Cas. 525; *Evansville, etc., R. Co. v. Henderson*, 134 Ind. 636; *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366, 47 Am. Dec. 259; *Kansas Pac. R. Co. v. Salmon*, 11 Kan. 83; *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35, 5 Am. & Eng. R. Cas. 594; *Union Pacific R. Co. v. Nichols*, 8 Kan. 505; *Gilshannon v. Stony Brook R. Co.*, 10 Cush. (Mass.) 228; *Seaver v. Boston, etc., R. Co.*, 14 Gray (Mass.) 466; *Higgins v. Missouri Pac. R. Co.*, 104 Mo. 413; *Moran v. New York Central & H. R. R. Co.* (N. Y.), 67 Barb. 96; *Ross v. New York Cent., etc., R. Co.*, 74 N. Y. 617; *Vick v. New York Cent., etc., R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36, 17 Am. & Eng. R. Cas. 609; *Manville v. Cleveland & T. R. Co.*, 11 Ohio St.

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417; *Kumber v. Junction R. Co.*, 33 Ohio St. 150; *Knahtla v. Oregon Short-Line, etc.*, R. Co., 21 Ore. 136; *Austin, etc., R. Co. v. Beatty*, 6 Tex. Civ. App. 650; *Corona v. Galveston, etc., R. Co. (Tex.)*, 17 S. W. Rep. 384; *Dallas v. Gulf, etc., R. Co.*, 61 Tex. 196; *Howland v. Milwaukee, etc., R. R. Co. (Wis.)*, 5 Am. & Eng. R. Cas. 578.

## ILLUSTRATIONS.

**Blacksmith Riding to Work and Engineer.**—An engineer, acting also as conductor on a train which carried an injured person, who was a head blacksmith, with a number of other employees, on a wrecking train to the locality of a wreck, was a fellow servant of such blacksmith, being engaged in a common service under a common master. *Abend v. Terre Haute & I. R. Co.*, 17 Am. & Eng. R. Cas. 614, 111 Ill. 202.

**Carpenter Riding to Work and Engineer.**—A carpenter employed by the day by a company to work on its road, and carried to the working place on the cars free of charge, cannot maintain an action for injuries received while so carried through the negligence of the engineer running the engine. *Seaver v. Boston & M. R. Co.*, 14 Gray (Mass.) 466.

**Conductor and Surveyor.**—A surveyor in the employ of a company, while being transported on a train free of charge, is a fellow servant with the conductor of the train, and cannot recover from the company for an injury caused by the conductor's negligence, in the absence of evidence that he was incompetent, or that the company had been negligent in employing him. *Ross v. New York C. & H. R. R. Co.*, 5 Hun (N. Y.) 488, *affirmed in* 74 N. Y. 617.

**Construction Hand Riding to Work and Engineer.**—Where one employed by a company to work in a tunnel was ordered by the superintendent of the work, under threat of dismissal, to get on a freight train for transportation to another tunnel, and in doing so he was violently cast on the ground and injured by the negligence of the engineer in starting the train, the company is not liable. *Capper v. Louisville, E. & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 525, 103 Ind. 305, 2 N. E. Rep. 749.

**Engineer and Laborer on Gravel Train.**—A laborer on a gravel train who, by arrangement, is entitled to be carried to and from his work free of charge, except that he may be required to apply the brakes if necessary, is a fellow servant with the engineer of the train while so riding. *Russell v. Hudson River R. Co.*, 17 N. Y. 134, *reversing* 5 Duer 39.

**Laborer on Construction Train and Engineer.**—An engineer and laborer on a railroad construction train are fellow servants where they work under the same conductor, derive their authority and compensation from the same common source, and are engaged in the same general business, though in a different grade of the common service. *Higgins v. Missouri Pac. R. Co.*, 104 Mo. 413, 16 S. W. Rep. 409.

An engineer and a laborer upon a construction train are fellow servants. *Miller v. Ohio & M. R. Co.*, 24 Ill. App. 326.

**Road Master, Conductor and Engineer.**—A road master was injured while riding on a train in discharge of his duties, through the negligence of the conductor and engineer. *Held*, that he was a fellow

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servant, and could not recover from the company without alleging and proving want of care in their selection. *Gulf, W. T. & P. R. Co. v. Ryan*, 69 Tex. 665, 7 S. W. Rep. 83.

**Section Hand Riding to Work and Conductor and Engineer.**—A section hand riding on a work train from one place of his work to another, under the charge of the road master, is a fellow servant of the conductor and engineer of such train. *Knahtla v. Oregon S. L. & U. N. R. Co.*, 21 Ore. 136, 27 Pac. Rep. 91.

**Servant Riding to Work and Train Guard.**—A servant while being carried from his work on one of the company's trains in the course of his contract of service is a fellow servant of the guard of such train, whose negligence causes a collision, and the master is not liable for injury to such servant. *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291, 12 Jur. N. S. 691.

**Trainmen and Laborer on Gravel Train Riding to Work.**—A common laborer on a railroad, while riding on a gravel train to his place of labor, was injured by a collision caused by the negligence of the company's servants in charge of the train. *Held*, that no action would lie against the company therefor, although both servants were not in a common employment. *Gillahannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 228.

**Held Not to Be Fellow Servants.**—In other cases the different department limitation has been considered controlling, and trainmen have been held not to be the fellow servants of other employees riding on the train. *O'Donnell v. Allegheny Valley R. Co.*, 29 Pa. St. 239; *Haney v. Pittsburgh, etc., R. Co.*, 38 W. Va. 570; *Coleman v. Wilmington, etc., R. Co.*, 25 S. Car. 446, 60 Am. Rep. 516.

**Foreman of Construction Hands and Engineer.**—Plaintiff was employed under a foreman in erecting a fence along the company's track, and was injured while going on a train to unload posts, by the engineer suddenly starting the train. *Held*, that the plaintiff and the engineer were not fellow servants. *Louisville, E. & St. L. Con. R. Co. v. Hawthorn*, 45 Ill. App. 635.

**Mechanic and Trainmen.**—Train hands operating a train are in a different department from a mechanic who is working for the company and is merely being carried to and from his place of work. *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239.

**Section Foreman Riding to Work and Conductor of Repair Train.**—A section foreman on a branch line was directed to take his men and assist in repairing the main line, and was injured through the negligence of a conductor on a repair train on the main line while going to the place of repair. *Held*, that they were not fellow servants, and he might recover from the company. *Union Pac. R. Co. v. Callaghan*, 56 Fed. Rep. 988.

Schmitt v. Missouri Pac. Ry. Co

SCHMITT *et ux.*

v.

MISSOURI PAC. RY. CO.

*(Supreme Court of Missouri, Feb. 12, 1901.)*

[60 S. W. 1043.]

**New Trial—Newly-Discovered Evidence—Discretion of Trial Court.**—Whether a new trial shall be granted for newly-discovered evidence is a question of discretion for the trial court, and, in the absence of an abuse of that discretion, the appellate court will not interfere.

**Accident on Track—Killing of Boy—New Trial—Sufficiency of Affidavit.**—The plaintiff's son, aged 10 years, while walking on defendant's track, was run over and killed by a train approaching from behind. Plaintiff, in support of a motion for a new trial for newly-discovered evidence, offered an affidavit stating that the affiant was standing 16 feet from the north side of a freight train which was passing on a track parallel with that on which deceased was walking, and that without stooping down he saw the boy, who was 12½ feet on the south side of the train. The affiant was a near neighbor of the plaintiff, but had never mentioned the fact that he saw the deceased on the track at the time of the accident until he heard plaintiff, after the trial, telling that he had lost his case because he could not prove where the boy was from the time he left home until immediately before the accident. *Held*, that the facts stated in the affidavit were not sufficiently credible to warrant the granting of a new trial.

**Same—Same—Contributory Negligence—Instructions.**—Plaintiff's son, aged 10 years, who had always lived near the defendant's railway track, and was aware of the danger of being on the same, was killed, while walking along the track, by a train approaching from behind. On the trial the jury were instructed in behalf of the plaintiff that it was the duty of the deceased to exercise that degree of care and prudence that an ordinarily careful and prudent person of his age and intelligence, under like circumstances, would have exercised. For the defendant the court instructed that if the deceased saw, or by looking and listening could have seen and heard, the engine approaching, then the plaintiff could not recover. *Held*, that these instructions were not conflicting.

**Same—Same—Violation of Ordinance Requiring Bell to Be Rung—Failure to Stop, Look and Listen.\***—Plaintiff's son, aged 10 years, who had always lived within a block of the defendant's railway tracks, was killed, while walking on defendant's track within the city of St. Louis, by a train approaching from behind. The boy was bright and intelligent for his age, and had been frequently warned of the danger of going on the railway tracks. A St. Louis ordinance required the bell

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\*See notes at end of case.

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on an engine to be rung constantly while the engine was moving, which was not done in this case. At the place of the accident the track was clear, so that an approaching train could have been seen 500 feet away. The deceased did not stop to look and listen before walking on the tracks. *Held* that, though the defendant was negligent in failing to ring the engine bell, the negligence of the deceased contributed to the injury, and hence a recovery was precluded.

Appeal from St. Louis circuit court; Jacob Klein, Judge. Action by Frank X. Schmitt and wife against the Missouri Pacific Railway Company. From a judgment in favor of the defendant, the plaintiffs appeal. Affirmed.

Taylor R. Young, Maurice L. Altheimer, and Wm. H. Reynolds, for appellants.

Martin L. Clardy and Henry G. Herbel, for respondent.

Burgess, J. This is an action by plaintiffs, father and mother of Albert B. C. Schmitt, deceased, to recover of defendant company \$5,000 damages for the death of their son,

*Case Stated.*

who was at that time aged 10 years and 1 month, by reason of the alleged negligence of defendant in failing to discover the boy on its track in time to have avoided the injury; the failure to ring the bell upon the engine, as required by the ordinance of the city of St. Louis, where the accident occurred; and by reason of having defective brakes on its train. No proof was offered upon the last ground of negligence alleged with respect to defective brakes, and it was therefore eliminated from the case. Upon a trial before the court and a jury, there was a verdict for defendant. In due time plaintiffs filed their motion for a new trial, on the ground of newly-discovered evidence, and the giving of erroneous instructions at the instance of defendant, which being overruled, they bring the case to this court by appeal for review.

The facts are substantially as follows: Between 3 and 4 o'clock in the afternoon of August 6, 1897, plaintiffs' son, who was then 10 years and 1 month old, while walking along upon defendant's southernmost or east bound of three parallel tracks in the city of St. Louis, was struck, run over, and instantly killed by one of defendant's passenger trains, which passed that point daily at about that hour. The accident occurred about midway between Tower Grove avenue and King's highway, on defendant's private way, where there was no street crossing said tracks, and where a person standing on the east-bound track, at the point where the boy was killed, could see a dog crossing the track at King's highway, which was about 1,500 feet distant. Of the three tracks at this point, two are what are called main tracks, and the other a switch track. The one upon which the boy was killed is used for east-bound trains, the middle track for west-bound, and the northmost for a switch track. The defendant had erected signboards at



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Tower Grove avenue, warning everybody not to trespass on the tracks. Race Course avenue adjoins defendant's right of way on the north, and parallels the tracks. The boy lived a block north of the point at which he was killed, had lived there for 10 years prior to his death, had on several occasions been forbidden by his father from walking and playing on the railroad tracks, and cautioned by him of the danger in so doing, and had been punished by him, on the morning of his death, for loitering about said tracks. Deceased was a bright boy for his age, and had been attending school for about four years. At the time of the accident the Hill-O'Meara Construction Company was constructing a sewer on the south side of defendant's right of way, parallel with defendant's tracks, the northern line of which was about 15 feet south of defendant's southernmost or east-bound track, the intervening space being occupied by the earth thrown out of the trench, which formed a ridge from 6 to 10 feet high, that extended along the south side of the track on which the boy was killed 100 feet or more. At the western end of the ridge a portable engine, inclosed with boards (referred to in the evidence as the "Engine House") was situated. Shortly before the accident the boy was seen about a team hitched to a wagon, from which was being unloaded material for the sewer, a little southwest of the engine house. He was called by the engineer of the Hill-O'Meara Construction Company, who was standing at a water barrel on the south side of the engine house ringing a tin bucket, and upon going to him was seen to take the bucket, and start around the west side of the engine house, towards defendant's track, which was only a few feet distant, on a path leading thereto. Shortly after he disappeared behind the engine house a passenger train, consisting of an engine and two cars, came along, and as there was a west-bound freight train passing that point on the track next north of the track on which the boy was killed, the usual passing signal (two short blasts of the whistle) were given by the passenger train a short distance west of the engine house. Just an instant before the boy was struck he was seen walking along east, about the center of the southern or east-bound track, by Edward Joyce, another boy, who was standing about 80 feet north of the tracks, with his dogs, awaiting the passage of the freight train on the west-bound track. As the freight train going west was between him and the boy, who was walking east on the next track south, he could only see about one-half of the boy's body by looking through under the freight cars. He only took two steps from the time Joyce first saw him until he was struck and killed by the east-bound passenger train, which did not stop, but went on. The Joyce boy gave the alarm, and ran to the boy, who was identified as plaintiff's son. There was evidence that the engine bell was not ringing at the time of the accident, but the evidence conclusively showed that the view of the track westwardly was unobstructed for at least 500 feet. The

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boy's father testified that a dog could be seen crossing King's highway from the point of the accident a distance of 1,500 feet. The defendant offered no evidence.

In behalf of plaintiffs the court instructed the jury as follows:

"(1) The court instructs the jury that it was the duty of the defendant's servants in charge of said east-bound engine and train of cars, while running or moving within the limits of the city of St. Louis, to cause the bell on the engine thereof to be constantly sounded; and, if you believe from the evidence that the bell on the engine of the train in question was not constantly sounded while said train was running or moving within said limits, then you should find that the defendant was guilty of negligence in that respect. (2) The court instructs the jury that it was the duty of the defendant's servants, in the running and handling of said east-bound engine and train of cars, to have exercised that degree of care and prudence which an ordinarily careful and prudent person, engaged in like business, would have exercised under like circumstances, and a failure to exercise such a degree of care and prudence would render the defendant guilty of negligence in that respect. (3) And, on the other hand, it was the duty of Albert B. C. Schmitt, in attempting to cross or walk upon defendant's track, to have exercised that degree of care and prudence that an ordinarily careful and prudent person of his age and intelligence, under like circumstances, would have exercised, and a failure to exercise such a degree of care and prudence would render him guilty of negligence. (4) The court instructs the jury that it was the duty of the plaintiffs, in the care and custody of their son, to have exercised such degree of care and prudence, in keeping him off defendant's railroad track and out of danger, which was reasonable and prudent under like circumstances, as shown by the evidence, and a failure to exercise such a degree of care and prudence would render plaintiffs guilty of negligence. (5) The court instructs the jury that, in determining the question as to whether the defendant's servants and employees were guilty of negligence in the present case, the jury are authorized to and should take into consideration the place at which the accident occurred; the manner in which the trains were being propelled; the number of dwelling houses in that vicinity; their distance from the track; and the probability of pedestrians being on the track at that time and place, if any. What would be ordinary care and prudence in running a train of cars in a sparsely-populated locality might be negligence in a more populous district, and it is for the jury to determine, in view of all the facts and circumstances of the case, whether defendant's servants did exercise ordinary care and prudence in the management of said train at the time and place mentioned in the evidence in this case. (6) If, therefore, the jury believe from the evidence that Albert B. C. Schmitt, on the 6th day of August, 1897, was the unmarried son of plaintiffs, and that on said day he

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was walking eastwardly on defendant's railroad track between Newstead and Taylor avenues, in the city of St. Louis, and that while so walking he was run over and killed by defendant's east-bound engine and train of cars in charge of defendant's servants, then your verdict should be for the plaintiffs, provided you further believe from the evidence that the injury complained of occurred while plaintiffs were exercising that degree of care as to the care and custody of their son, as that term is explained in instruction No. 4, and while the said Albert B. C. Schmitt was himself exercising that degree of care and prudence for his own safety that an ordinarily careful and prudent person, of his age and intelligence, under like circumstances, would have exercised, and provided that you further believe from the evidence that the injury was caused by the negligence of the defendant's servants, as the term 'negligence' is explained in either the first or second of the foregoing instructions. (7) Even though the jury should find that Albert B. C. Schmitt was negligent in attempting to cross or walk upon defendant's railroad track, and that the plaintiffs were also guilty of negligence in the custody and care of their said son, and even though you believe from the evidence that the negligence of either the plaintiffs or their said son, Albert B. C. Schmitt, directly contributed to cause the injuries complained of, still if you further believe from the evidence that Albert B. C. Schmitt had placed himself in a dangerous position by going on defendant's railroad track, and thereafter such dangerous position became known, or in the exercise of ordinary care and diligence could have become known, to defendant's servants in charge of said train in question, in time to have stopped said train by the exercise of ordinary care, and avoided the injury complained of, and failed to do so, then your verdict should be for the plaintiffs. (8) The court instructs the jury that, if you find for the plaintiffs, you will assess their damages in the sum of five thousand dollars. If you find in favor of defendant, you need merely state in your verdict that you find the issues joined in this case in favor of the defendant."

Over the objection and exception of plaintiffs, the court instructed the jury in behalf of defendant as follows: "The court instructs the jury that the plaintiffs claim that the death of Albert B. C. Schmitt, their minor son, was occasioned by the following negligence on the part of the defendant company; that is to say: (1) That the defendant's servants and agents in the charge of the engine and train of cars which struck the deceased saw, or in the exercise of reasonable care and diligence in keeping a lookout for persons on the track could have seen, him in time to have stopped the train and avoided striking him. (2) That defendant's servants and agents in charge of the engine and train failed to ring the bell, as required by ordinance of the city of St. Louis, which provides that all cars and locomotives propelled by steam power, when mov-

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ing in said city, shall keep the bell constantly ringing. (3) That the defendant permitted its brakes for the stopping of said engine and train of cars to become defective, out of order and repair, by reason of which said engine and train of cars could not be stopped in time to avoid collision with plaintiffs' son. There is no evidence before you to support this specification of negligence. These allegations the defendant has denied in its answer. The defendant has also alleged, by way of affirmative defense, that whatever injuries plaintiffs' said son sustained by its train were caused, in whole and in part, by his own contributory negligence. With reference to the charges by the plaintiffs, as their ground of action, the jury is instructed that facts supporting them must be proved, and it must further appear that they were the cause of the injuries and death of plaintiffs' son. With respect to the issue of contributory negligence of the deceased son of plaintiffs, the jury are charged that the burden of proving such negligence rests upon the defendant. From this, however, it must not be inferred that it devolves upon the defendant to introduce upon its part independent witnesses to give testimony tending to show such facts, if they exist, but the defendant may rely upon the facts, and necessary inferences from the facts, elicited from plaintiffs' witnesses as well as its own." "(b) The court instructs the jury that if they believe from the evidence that the deceased saw the engine approaching, or knew of its approach, before he got upon the track, or could have seen such engine by looking, or could have heard it approaching by listening, then the failure of defendant's servants to ring the bell of the engine, if a fact, is immaterial, and plaintiff is not entitled to recover on that ground of negligence. The court further instructs the jury that plaintiffs ought not to recover in this case unless they find from the evidence that the servants and agents of defendant in charge of the engine saw, or by the exercise of ordinary care and diligence might have seen, deceased on defendant's track in time to have stopped the train, and thus averted the injury. The jury are also instructed that if, after deceased entered upon the railroad track, the employees in charge of the train which struck him did not have time, by the exercise of ordinary diligence, to stop the train, then no negligence can be imputed to defendant company because they did not do so, and the verdict should be for the defendant." "(e) The jury are further instructed that, while it may have been the duty of defendant's servants or agents to make all reasonable efforts to stop the train and avoid a collision, yet a duty also devolved upon the deceased, and if after he saw the train coming, or might be looking or listening have seen or heard it coming, he could have gotten out of its way, or kept out of its way, but did not, then the plaintiffs cannot recover, unless you should further find from the evidence that after the deceased was in a position of peril the defendant's servants in charge of said train either saw him, or by the

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exercise of ordinary care might have seen him, in time to have stopped the train, by the exercise of ordinary care, before it struck him. Although the jury may believe from the evidence that defendant's employees were guilty of negligence in failing to discover the presence of plaintiffs' son, Albert B. C. Schmitt, on the track, yet if they also believe from the evidence that said Albert B. C. Schmitt was negligent in failing to discover the approach of defendant's train in time to have kept out of its way, or to have gotten out of its way if in it, then your verdict will be for the defendant, unless you should further find from the evidence that after the deceased was in a position of peril the defendant's servants in charge of said train either saw him, or by the exercise of ordinary care might have seen him, in time to have stopped the train, by the exercise of ordinary care, before it struck him. The court instructs the jury that if they believe from the evidence that the death of plaintiffs' son, Albert B. C. Schmitt, was the result of mere accident or casualty, and not of negligence on the part of the defendant, your verdict will be for the defendant."

The first question for consideration presented by this appeal is with respect to the action of the court in overruling plaintiffs' motion for a new trial upon the ground of newly-discovered evidence. In order to justify a trial court in granting a new trial upon the ground of newly-discovered evidence, one of the essentials is that it is so material that it would probably produce a different result if the new trial be granted (*State v. Ray*, 53 Mo. 345; *St. Joseph Folding-Bed Co. v. Kansas City, Ft. S. & M. R. Co.*, 148 Mo. 478, 50 S. W. 85; *Culbertson v. Hill*, 87 Mo. 553); with respect to which the trial court was in a much better situation to judge than we are. Much, therefore, must be conceded to the discretion of the court in its ruling in regard to the matter, and, unless it be made to clearly appear that such discretion was unwisely exercised, this court will not interfere.

New Trial—  
Newly-Discovered Evidence  
—Discretion of Trial Court.

In support of the motion, the plaintiffs read in evidence the affidavit of one Hanson, from which it appears that he was standing about 10 or 15 feet from the passing freight train, which was between him and the boy. The evidence shows that the east and west bound tracks were 10 feet apart, and that the boy was walking in the middle of the east-bound track, which would place him 12½ feet south of the moving freight train, and it is inconceivable how he could have seen the boy under these conditions, unless he had stooped and looked under the cars, and this he does not pretend to have done. The evidence adduced by defendant on the question showed almost conclusively that Hanson was not near the place where the boy was killed at the time of the accident. Moreover, it was shown that Hanson was a near neighbor to plaintiffs, living in the same block, and that the deceased boy was a playmate of

Accident on  
Track—Killing of  
Boy—New Trial  
—Sufficiency of  
Affidavit.

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Hanson's son, whom he took to plaintiffs' house to view the dead boy's remains, and never at any time intimated to plaintiffs that he knew anything about the accident until after the trial, and not then until he met the father of the boy in a saloon, and heard him telling some persons present that he lost his case because he could not prove the whereabouts of his son from the time he left the house until a witness by the name of Joyce saw him, when he volunteered to tell the father of the boy what he knew about where the boy was at the time indicated. The statements in the affidavit of this witness seem to us to be incredible, and it is utterly impossible to see how plaintiffs could have expected the court to place any credence in them.

The only objections to the instructions given in behalf of defendant are to the paragraphs of instruction numbered 3 marked "b," and "e," which are criticised upon the grounds that they are in conflict with plaintiffs' third and sixth instructions, in that the one tells the jury that, if they believe from the evidence that the deceased was as careful under the circumstances as they thought any other child of the age and intelligence of deceased would have been, then the latter was negligent; while paragraph marked "e" tells the jury that if deceased failed to look and listen, and by so doing could have gotten out of the way of the train, or kept out of its way, he was negligent. The argument is that the jury may have believed that the deceased did exercise all the care required by plaintiffs' instructions 3 and 6, and found, as they evidently did, that upon the theory that, under the circumstances of the case, any one could, by looking out and listening, discover a train in time to get out of its way, the deceased did not look and listen, and was therefore guilty of such contributory negligence as to prevent recovery. But instruction No. 3 must be considered as a whole, and, where this is done, it does not seem to us that there is any conflict in it. It simply presented the defendant's defense, and, although defendant may have been guilty of negligence in failing to ring the bell, yet, if deceased was guilty of negligence contributing to his injury, plaintiff could not recover.

While it is well settled that moving a railroad train in a city, in violation of its ordinances requiring the bell upon its engine to be continuously rung is negligence in itself (Karle v. Railroad Co., 55 Mo. 477; Murray v. Railway Co., 101 Mo. 236, 13 S. W. 817; Hanion v. Railway Co., 104 Mo. 381, 16 S. W. 233), "such negligence alone will not warrant a recovery when it appears that obedience to the requirements of the ordinance would not have prevented the injury, but not otherwise" (Hanlon v. Railway Co., supra; Karle v. Railroad Co., 55 Mo. 482; Zimmerman v. Railroad Co., 71 Mo. 476; Barkley v. Railway Co., 96 Mo. 367, 9 S. W. 793; Hudson v. Railway

Same-Same-  
Contributory  
Negligence-In-  
structions.

Same-Same-  
Violation of  
Ordinance Re-  
quiring Bell to  
Be rung-Failure  
to Stop, Look  
and Listen.

## Notes

Co., 101 Mo. 18, 14 S. W. 15; *Henry v. Railway Co.*, 76 Mo. 293). That this was the view taken by the court clearly appears from plaintiffs' first instruction, by which the jury were told that, if they believed from the evidence that the bell on the engine of the train that ran over deceased and killed him was not constantly sounded while said train was running or moving within the city limits, they would find the defendant guilty of negligence in that respect. That a person who walks upon a railroad track, without looking and listening for approaching trains, is guilty of negligence, is well-settled law, and, if such negligence contributes directly to his injury, no recovery can be had therefor. Deceased was a sprightly boy 10 years and 1 month of age at the time of his death; the train that ran over and killed him was in full view for 500 feet before it struck him; it was in the light of the broad day; and he knew all about the danger of being upon and about the railroad tracks, for he had been warned of it on several occasions by his father; yet he heeded not the warning, but recklessly went upon the track, in front of a near approaching train, evidently without looking and listening, and was killed, and must be held to have contributed directly to his own death. *Spillane v. Railway Co.*, 135 Mo. 414, 37 S. W. 198.

The question as to the negligence of defendant in failing to ring the bell, and of deceased in going upon the track in front of the approaching train without looking and listening, as he must have done, and the care and prudence required of him commensurate with the intelligence, capacity, and experience he was shown to possess, as well also as all other issues involved in the case, were very fully and fairly submitted to the jury. And, while they must have found that defendant's servants in charge of the train were guilty of negligence in failing to ring the bell as required by the ordinance, it is clear from the evidence that the failure to do so in no way contributed to the death of plaintiffs' son, but that he contributed directly to his own death by going upon the track without looking or listening, and this was the logical result of their verdict. Our conclusion, therefore, is that the judgment should be affirmed, and it is so ordered.

Sherwood, P. J., and Gantt, J., concur.

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NOTES.

**Contributory Negligence Will Prevent Recovery for Personal Injuries in Action Based on Violation of Ordinance Limiting Speed and Requiring Signals to Be Given.**—See *Neal v. Carolina Cent. R. Co.* (N. Car.), 18 Am. & Eng. R. Cas., N. S., 51, and *foot-note*.

**Violation of Ordinances Requiring Signals to Be Given—Negligence.**—It is negligence to run a train in a city with twice the rapidity allowed by a city ordinance, and without ringing the bell, sounding the whistle,

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or giving any signal of approach. *St. Louis & S. E. R. Co. v. Mathias*, 50 Ind. 65.

The failure to ring a bell on a moving railroad engine, as required by a city ordinance, constitutes negligence; and such negligence alone will warrant a recovery when it appears that obedience to the requirements of the ordinance would have prevented the injury sued for, but not otherwise. *Hanlon v. Missouri Pac. R. Co.*, 104 Mo. 381, 16 S. W. Rep. 233.

**Same—Gross Negligence.**—Where a city ordinance prohibits running trains through the corporate limits at a speed greater than six miles an hour, and requires the placing of signals upon the engines of trains running in the nighttime, if a company runs an engine without the signals and at an unlawful speed over a crossing which large numbers of people are in the daily habit of using, and fails to ring a bell on approaching such crossing, the negligence of the company is gross, and will authorize a recovery, even where the place of accident is not on a public highway, but on plaintiff's right of way. *East St. Louis Connecting R. Co. v. O'Hara*, 49 Ill. App. 282.

**Accidents at Crossing—Failure to Give Signals and Contributory Negligence.**—See extensive *note*, 10 Am. & Eng. R. Cas., N. S., 518 *et seq.*

**Contributory Negligence of Children.**—As to the degree of care required of children for their own protection, see *notes*, 19 Am. & Eng. R. Cas., N. S., 355 *et seq.*

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**BANKS**

*v.*

**GEORGIA R. & BANKING CO.**

(*Supreme Court of Georgia, Jan. 26, 1901.*)

[37 S. E. 992.]

**Injuries to Lessee's Employee—Liability of Lessor.\***—A chartered railroad company, which, under legislative authority, leased its tracks and franchises to another such company, is not liable for the homicide of an employee of the latter, caused by the negligence of a co-employee.

**Same—Same—Pleading.**—Even if the lessor company be liable for such a homicide when caused by a defect in the track of the leased line, the allegations of the petition in the present case failed to show that the track was defective.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by James Banks against the Georgia Railroad & Banking Company. Judgment for defendant, and plaintiff brings error. Affirmed.

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\*See *Little Rock & Ft. S. Ry. Co. v. Daniels* (Ark.), 19 Am. & Eng. R. Cas., N. S., 609, and *foot-note*.



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Arnold & Arnold, for plaintiff in error.

Jos. B. & Bryan Cumming, for defendant in error.

Fish, J. This was an action proceeding in the name of James Banks, as the administrator of the estate of Fannie R. Thurmond, deceased, against the Georgia Railroad & Banking Company, for the tortious homicide of Earle Thurmond, the husband of plaintiff's intestate.

**Case Stated.**

The petition alleged that the defendant had leased its track and franchise to the Louisville & Nashville Railroad Company, and that there was no legislative authority exempting the defendant from responsibility for the acts of the lessee company in operating the road; that at the time of the homicide Earl Thurmond was in the employment of, and working for, the lessee company as a car coupler on the line it had leased from the defendant, and that his death resulted from the negligent putting in motion of an engine and cars of the lessee by its engineer, thereby causing the deceased to get his foot caught in a frog in the track, and to be run over and killed; that the frog "was very dangerous, and was negligently allowed to remain unblocked"; and that "not only did the deceased not know of the defective and dangerous condition of said track and frog, but deceased had been in the yard only for a short time, and had not come in contact with this frog; in the exercise of ordinary care, it was not his duty to see or know the condition of this frog, and on the occasion of his death it was dark, and the frog was not visible," and, "had it not been for the presence of said defective frog, the homicide would not have occurred"; and that the deceased was wholly without fault. His age, life expectancy, and earning capacity when killed were also alleged. The defendant demurred generally to the petition; and "because the engineer, whose alleged negligence was the proximate cause of the accident, was not an employee of this defendant, but both he and the deceased were employees of another corporation; and, further, because the alleged dangerous and negligent condition of the right of way was not the proximate cause of the injury, and was, moreover, known to the deceased."

The charter of the Georgia Railroad & Banking Company, of which the judge took judicial cognizance, authorizes it to lease its line of road, but contains nothing exempting it from liability for the acts of the lessee in operating the franchise. The demurrer was sustained generally by the court, and the plaintiff excepted. The question is therefore presented for determination

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whether a chartered railroad company, after leasing its road and franchise by legislative authority to another company, is liable for the tortious homicide of an employee of the lessee company, while the two employees are engaged in operating a train of the lessee's cars on the leased line; there being no

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statutory exemption absolving the lessor company from such liability. There is great contrariety of judicial opinion in respect to the responsibility to the public of a lessor railroad company for the acts of the lessee's servants in operating the franchise, where the lease is authorized by statute, but without a provision for the lessor's exemption from liability. We apprehend, however, that no case can be found where it is held, in the absence of a statute creating the liability, that a proprietary railroad company which has, by legislative authority, leased its road and franchise, is responsible for a tort to an employee of the lessee resulting from the negligence of a co-employee. In *Railroad Co. v. Mayes*, 49 Ga. 355, it was held: "Where a railroad company permits other companies or persons to exercise the franchise of running cars drawn by steam over its road, the company owning the road, and to which the law has intrusted the franchise, is liable for any injury done, as though the company owning the road were itself running the cars." In that case the company owning the road was held liable for a tort to an employee of the company using the franchise, occasioned by the negligence of his co-employee; but there was no legislative authority for the latter company to use the franchise; indeed, there was no lease at all. And therein lies the marked distinction between that case and the one in hand. Here the Georgia Railroad & Banking Company had express authority in its charter to lease its road. The case of *Jones v. Railroad Co.*, 66 Ga. 558, is exactly in line with the case under consideration. There the Georgia Southern Railroad Company, in accordance with the power given in its charter, as well as by the decretal order of a distinct court of the United States, leased all its property and franchises to Walker and Tucker. Jones, a track hand, sued Tucker and the Georgia Southern Railroad Company, as partners running the road, for an injury resulting, as he alleged, from the negligence of a co-employee. Tucker was not served, and the case proceeded against the railroad company. Upon the trial it appeared that Jones was an employee of Walker and Tucker, who were operating the road under the lease. A nonsuit was granted, and this court, in affirming the judgment of the trial court, Mr. Justice Crawford delivering the opinion, said: "On the judgment of nonsuit, to which exception was also taken, we can see no error. The plaintiff, Jones, was the track hand and servant of Walker and Tucker, lessees, and not of the Georgia Southern Railroad Company, then the only defendant before the court in this case." The headnotes in the case do not refer to this point, but they were prepared by the reporter, and not by the court. In such a case the opinion on the points ruled is authority, and not the mere synopsis thereof subsequently made by the reporter. See, also, *Banking Co. v. Strauss*, 110 Ga. 189, 35 S. E. 332. The only other case involving the right of an employee of the company using the road to hold the proprietary

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railroad company liable for an injury caused by the negligence of a co-employee, which has come to this court, is that of Killian v. Railroad Co., 79 Ga. 234, 4 S. E. 165. Killian was an employee of the Port Royal & Augusta Railroad Company, on its train which was temporarily running over the line of road of the Augusta & Knoxville Railroad Company by its consent. There was no lease. The car upon which Killian was riding was derailed, and he was killed. In a suit for his homicide brought by his widow against the Augusta & Knoxville Railroad Company, the owner of the track, it was held that the only duty or obligation the defendant company was under as to Killian was to furnish a safe track for the running of the train upon which he was riding. The trial court charged the principle announced in the Mayes Case, supra, but this court thought it inapplicable, and undertook to distinguish the cases. See Killian v. Railroad Co., 79 Ga. 244, 4 S. E. 167. Counsel for plaintiff in error cite the case of Singleton v. Railroad Co., 70 Ga. 467. It appears in that case that the Southwestern Railroad Company had, by legislative authority, leased its roads and franchises to the Central Railroad & Banking Company, and that it was operating the leased lines in the name of the lessor company, with its consent; that Singleton was a passenger on the leased road, with a ticket purporting to have been issued by the lessor company, sold to him by the agent of the lessee company; and that while such a passenger Singleton received personal injuries by reason of the negligence of the lessee's employee in putting him off the train. There was no legislative exemption absolving the Southwestern Railroad Company from liability for the negligent acts of the employees of the lessee company. This court held that, notwithstanding there was legislative authority for the lease, the proprietary company was, under such circumstances, liable to Singleton for the injuries resulting to him from the torts of the lessee's employees. In the synopsis of the points decided it was said: "A railroad company which has leased its road, cars, and engines, and allows the lessee company to operate the same in the name of the lessor company, is liable to third persons or the public for the carelessness and negligence of the lessee company, in the absence of statutory provision to the contrary. \* \* \* The original obligation of a railroad company to the public cannot be discharged, except by legislative enactment consenting to and authorizing the lease, with an exemption granted to the lessor company from liability. Legislative consent to the lease is not alone sufficient. There must be a release from the obligations of the company to the public." It will be seen that the question dealt with there is essentially different from that involved in the case under consideration. There the point was whether a lease authorized by charter, but without legislative absolution, to the lessor company, released it from the performance of its duties and obligations to the public. The duty of

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safely transporting Singleton was a duty owing to the public as such, which the court said the lessor company could be relieved of only by legislative exemption. In the opinion, Mr. Justice Crawford, who also rendered the opinion in the Jones Case, recognizes the distinction between the rights of a passenger and those of an employee of the lessee as against the lessor company. The learned justice says: "But it is said that the case of Jones v. Railroad Co., 66 Ga. 558, rules this case in favor of the defendant in error. We do not so understand it. In that case there were two questions made and decided. One was that the leaving a copy, declaration, and process with a depot agent was not sufficient service on an individual lessee of a railroad, even though the lease under which he operated the road may have been made by authority of law; the other, that Jones, the plaintiff, being the track hand and servant of the individual lessees, and not of the Georgia Southern Railroad, the latter would not be bound to answer in damages for injuries alleged to have been caused by a co-employee, likewise in the service of the said individual lessees, and especially when the said Jones did not show himself free from fault. The case at bar is widely different, in that it arose, not between the lessee company and one of its servants, but between itself, as operated by the lessee company in its name, and the public, in the exercise of one of its most important franchises,—the transportation of passengers." The conclusion we have reached is that the present case, under its facts, is not controlled by the rulings made in the cases of Railroad Co. v. Mayes and Singleton v. Railroad Co., supra, but is governed by the decision in Jones v. Railroad Co., supra.

2. Granting the Georgia Railroad & Banking Company would be liable for the homicide of Thurmond, if it resulted from a defective track, the petition in this case fails to allege any defect in the track other than an unblocked frog. The mere fact that a frog was unblocked does not show the track to be defective. The court cannot know whether it is the general custom or not to block frogs. It may be that all the frogs on this line of road were unblocked when Thurmond was employed and when he was killed, and they may have been dangerous, but, if so, the danger was one of the risks of the business which was assumed by the employees. See Railway Co. v. Edwards, 111 Ga. 528, 36 S. E. 810. There being no error in sustaining the demurrer to the petition, the judgment is affirmed. All the justices concurring.

~~Same-Same-  
Pleading.~~

## Anderson v. Atlantic Coast Line Ry. Co

ANDERSON

v.

ATLANTIC COAST LINE RY. CO.

*(Supreme Court of South Carolina, March 4, 1901.)*

[37 S. E. 944.]

**Railroads—Cattle Guards.**—Rev. St. §§ 1729, 1730, requires every railroad company to maintain adequate stock guards where the track crosses any fence, and provides that the penalty imposed for failure to do so shall be paid "to the owner of the fence." *Held*, that a railroad company which has constructed its road through land to which it has acquired a fee-simple title by a deed containing no reservations has an absolute right to fences built thereon by the former owner before he parted with his title, and such company is therefore not required to maintain stock guards at the points where its track crosses the line of such fences.

Appeal from common pleas circuit court of Barnwell county;  
D. A. Townsend, Judge.

Action by H. P. Anderson against the Atlantic Coast Line Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

John E. Allen and Izlar Bros., for appellant.

J. T. Barron and Robt. Aldrich, for respondent.

McIver, C. J. This was an action brought by the plaintiff against the defendant company to recover the penalty imposed by statute upon a railroad company for failing to construct and keep in repair adequate stock guards or cattle gaps at the points where the railroad of the defendant company crosses the lines of certain fences alleged to belong to plaintiff, on a certain tract of land in Barnwell county, of which the plaintiff is alleged to be the owner. The statutory provisions under which the action is brought are to be found in sections 1729 and 1730 of the Revised Statutes of 1893; and the allegation in the complaint is "that this plaintiff is the owner of a certain plantation or tract of land situated in Barnwell county, through which this railroad has been constructed, and which runs through his pasture, crossing his pasture fence in four different places, destroying the use of the same to him, and allowing his cattle to run at large, without constructing or keeping in repair any adequate stock or cattle guard or gap at every point where the line of said railroad of said company crosses or may hereafter cross the line of any fence in

## Anderson v. Atlantic Coast Line Ry. Co

this state." The defendant by its answer set up as its first defense a general denial of each and every allegation contained in the complaint. The case came up from trial before his honor, Judge Townsend, and a jury, at November term, 1899; and the jury having found a verdict for the defendant, and judgment having been entered on said verdict, the plaintiff appeals upon the several grounds set out in the record, which, together with the charge of the circuit judge, should be incorporated by the reporter in his report of the case.

The undisputed testimony shows that on the 21st day of September, 1898, the plaintiff and his wife executed a deed to the defendant company by which they conveyed to the said company, in consideration of the sum of \$100, "all that piece, parcel, or strip of land lying and situate in the county of Barnwell, state aforesaid, the same being one hundred and thirty feet wide and 2,573 feet long, more or less, extending through and across my lands in said county; the exact location to be determined by the said company. \* \* \* Said strip of land is bounded on the east by Lower Three runs and the lands of Dr. Allen Patterson, and on the west by lands of Richard Cave." A copy of this deed is set out in the "case," and should likewise be incorporated by the reporter in his report of the case. This deed differs in no respect from an ordinary deed in fee simple, with full covenants of warranty, except that immediately after the words above quoted, giving the boundaries of the said strip of land, the following words are inserted: "And the undersigned to fix the pasture fences." Testimony was offered tending to show what passed between the parties before the deed was executed, which in many instances was objected to at the time it was offered; and one of the witnesses for the defense (R. J. Latta was allowed to testify, without objection, that he was with another witness, A. J. Galloway, who was the agent of the defendant company charged with the duty of obtaining rights of way, when Galloway first met the plaintiff, on the day before the deed was signed; and he said, among other things, that he heard Galloway make the plaintiff an offer, the amount of which he did not remember, which the plaintiff refused "because he said he would have to have more; he would have his fences to fix." And Galloway, whose testimony was taken by the master out of court, said: "It was my purpose not to pay one landowner more than another, where the damages were about the same, for the right of way; and, in order that we might arrange at a uniform price, Mr. Alfred Aldrich preceded me on the line, and found about what would be the cost of rights of way, and on his estimate the right of way over the land of H. P. Anderson would be \$55. I paid him \$100, which was to relieve us, as I said before, of any further expenses relating to fences." It is true that there was a motion afterwards to strike out the testimony of Latta, above referred to; but after some colloquy between the counsel and the court, and after hearing the testimony of Latta read

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by the stenographer, the motion was withdrawn. It was still insisted that Galloway's testimony was objected to at the time it was taken, whereupon the court ruled as follows: "The court orders certain testimony of Mr. Galloway stricken out, and designates the portion which should be stricken out." But the testimony of Galloway, as printed in the "case," does not designate what portions of it are noted as objected to, and to that portion of it which we have copied above there is no note of any objection. Inasmuch, however, as there seems to be some confusion about what particular testimony of Galloway was ordered to be stricken out, we may say that, under the view which we take, it is immaterial whether all or any of it was ruled out.

Under our view, the controlling question in the case is whether the statutory provisions above referred to are applicable to the case, under the undisputed testimony; in other words, whether a railroad company which has constructed its road through its own land, to which it has acquired a fee-simple title by a conveyance from the former owner, can be required to construct and keep in repair adequate stock guards or cattle gaps at every point where its track crosses the line of a fence which such previous owner had built for his own convenience before he parted with title to the land on which such fence was built. The statute (Rev. St. 1893) under which this action is brought reads as follows:

"Sec. 1729. The several railroad companies whose lines of road lie wholly or partly in this state are hereby required to construct and keep in repair an adequate stock guard or cattle gap at every point where the line of said railroad of any such company crosses, or may hereafter cross, the line of any fence in this state.

"Sec. 1730. In every violation of the preceding section, the railroad company so violating it shall pay to the owner or owners of the fence upon the line of which such stock guard or cattle gap should have been constructed and kept in repair the sum of one hundred dollars, to be recovered by action in the court of common pleas for the county in which such stock guard or cattle gap should have been constructed and kept in repair."

It is very manifest that these two sections must be read together, as the one is but the complement of the other. Looking at the former alone, it is very clear that a right of action for the breach of duty imposed upon a railroad company is not conferred for any one. We must therefore look to the provision of section 1730 in order to ascertain what is the penalty prescribed by the violation of the provisions of the preceding section, and to whom such penalty shall be paid. There it is very plainly provided that such penalty shall be paid "to the owner or owners of the fence upon the line of which such stock guard or cattle gap should have been constructed," and he or they, if more than one, alone can bring

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an action for the recovery of the same. Now, in this case the undisputed testimony shows that before the defendant company commenced the construction of its railroad, and before the fences which crosses its track were torn down or in any way interfered with, the said company had acquired the absolute, fee-simple title to the land upon which such fences had previously been built by the former owner of the land, and had thereby acquired the absolute right to such fences; for it will scarcely be denied that, where one purchases a piece of land and obtains a title to the same, he also acquires the right to any buildings, fences, or other structures then upon the land, unless there is a reservation in the conveyance by the grantor of his right to the same; and there is no such reservation in the deed by which the defendant company acquired title to the land through which the railroad was constructed. So that the plaintiff was not the owner of any fence, the line of which was crossed by the railroad track of defendant, and therefore could not maintain an action for the recovery of the penalty prescribed by the statutory provisions upon which the plaintiff's action is confessedly based. It would have been very different if the defendant company had acquired merely a right of way over the land through which the railroad was constructed, either by agreement with the landowner or by condemnation proceedings, or in any other way; for in such case the defendant company would have had no title to the land, but would simply have acquired a right of way over the land of the plaintiff,—a mere easement,—which it could only use for the purpose of its railroad, leaving the title to the land in the plaintiff. In such a case the statutory provisions relied on would have had their full application, and, if the defendant had failed to comply with the provisions of the statute, the plaintiff could have had his right of action for the recovery of the penalty imposed. But that is not the case made here. When the plaintiff learned that the defendant proposed to build its railroad through his land, he had an option to pursue either one of the three courses: (1) He might, by agreement with the defendant company, have conveyed to it a mere right of way through his land, by which he would have preserved the right which he is now claiming; or (2) he might have forced the defendant company to resort to condemnation proceedings in order to obtain the right of way, which also would have preserved the right which he is now claiming; or (3) he might (as he did do) sell and convey a certain portion of his land, of specified dimensions, to the defendant company. It is conceded that he voluntarily adopted the third alternative, and he must take the consequences of his own act. Suppose he had sold and conveyed to some neighbor or other third person the same land which he sold and conveyed to the defendant company, by the same sort of deed, containing no reservations whatever; could it for a moment be contended that he still retained any right of any kind in the



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land, or to the fences or other structures which may have been upon the land at the time such conveyance was made? Why, then, does a railroad company stand in any worse position? The statute contains no hint or suggestion that the legislature intended that under the same circumstances one rule should apply in the case of a private individual, and another in the case of a railroad company. Indeed, if anything, it seems to imply the contrary; for, when it provides that the penalty shall be paid to the owner of the fence, it seems to imply that it was intended that the statute should apply only when the ownership of the property remained in the former proprietor, and the railroad had acquired only the right of way,—a mere easement. There may be, and probably is, very good reason why the legislature should make such a provision as that found in the statutory provisions relied on, where a railroad company has been permitted by the exercise of the right of eminent domain to acquire a right of way over the land of another, or has in any other way acquired such right of way, for the protection of the rights and convenience of the landowner as far as may be consistent with the enjoyment of such easement. But we can conceive of no reason why the legislature should undertake to make such a provision in favor of a landowner who has voluntarily chosen to sell and convey a portion of his land to a railroad company for the purposes of its road, without making any provision for protecting himself from any inconvenience, loss, or injury which might result from such absolute sale and conveyance. To use an illustration suggested by counsel for respondent in his argument: Suppose the defendant company should have seen fit, or should hereafter see fit, to establish a station at the point where the railroad track crosses the line where plaintiff's pasture fences formerly stood, build depots and an eating house, and also sell lots, within the lines of its own lands, with a view to encourage the building up of a town; what would then become of the right which the plaintiff is now claiming, if the company did so? And surely its right to do so could not be questioned, for it had just the same right to use land to which it has acquired the fee-simple title as any other landed proprietor may use his own land. These and other considerations which might be suggested are quite sufficient to show that the provisions of the sections above referred to do not apply, and were not intended to apply, to a case like this. We do not think, therefore, that there was any error on the part of the circuit judge in the instructions which he gave to the jury upon this point, and all the exceptions raising the question as we have stated it above must be overruled. This is conclusive of the case. We need not consider the points made by any of the other exceptions, as we do not regard them as material to the case as made by the undisputed testimony.

It will be observed that we lay no stress whatever upon the language above quoted from the deed, "And the undersigned

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to fix up the pasture fences," for several reasons: In the first place, under the view which we have taken, we do not consider those words material; for they certainly do not purport to impose any duty whatsoever upon the defendant company, but, on the contrary, they do purport to impose some duty upon the plaintiff. In the next place, we do not exactly understand what was the intention of the parties in inserting those words. They are certainly ambiguous, and the parol testimony offered to explain what the parties really meant was rejected,—whether rightfully or not is not made a question in this case. We may say, however, that they purport to impose some duty upon the plaintiff, but what it was is not clear. But, as we have said, we do not regard those words as material, or in any way affecting the conclusion which we have reached.

The counsel for appellant has cited several cases from other states, none of which seems to be applicable to the view which we have taken, so far as we can perceive from the statement made of them in the argument. For example, the case of *Poler v. Railroad Co.*, 16 N. Y. 476, is represented to hold "that a company acquiring the right of way by private grant is not released from its statutory obligations as to fencing, etc., even though nothing is said of it in the deed." We have no fault to find with that decision as thus stated; for it will be seen, in what we have said above, that we concede that, where a railroad company acquires a right of way by a grant or deed, the provisions of our statute do apply. But we contend that where a railroad company acquires an absolute, fee-simple title to the land through which its road is constructed, the statute does not apply, for the reasons given above. The other decisions cited from New York and the case from Kentucky seem to be of the same tenor, and therefore call for no further remarks. It is difficult to conceive what possible application the case of *Railroad Co. v. Morris*, 35 Ark. 622, which is represented as holding that a grant of a right of way gives no license to overflow grantor's land by the unskillful construction of a levee, can have to the case under consideration. So, also, the case of *Railroad Co. v. Morrow*, 32 Kan. 217, 4 Pac. 87, and the case of *Heskett v. Railroad Co.*, 61 Iowa, 467, 16 N. W. 525, seem to relate only to questions as to what constitutes a sufficient cattle guard, whether it is the duty of the company owning the railroad, or its lessee, to construct cattle guards, and how far the cattle guard shall be constructed beyond the railroad track; and none of these questions arise in our case, for the obvious reason that no cattle guards of any kind have ever been constructed. Besides, these cases from other states are not binding on us; and, in the absence of any decision of our own, we have rested our conclusion upon the construction of the terms of our own statute. The judgment of this court is that the judgment of the circuit court be affirmed.

Cagwin v. Chicago &amp; N. W. Ry. Co

## CAGWIN

v.

CHICAGO &amp; N. W. RY. CO.

*(Supreme Court of Iowa, Jan. 26, 1901.)*

[84 N. W. 1032.]

**Railroads—Fences—Injuries to Live Stock—Damages.\***—Where a railroad which crossed a stream near a highway, which it also crossed, fenced its right of way up to the bridge, and connected the fence with the bridge so that cattle could not go on the track, but could pass over the right of way under the bridge, it was not liable in double damages for injuries to plaintiff's cattle which passed under the bridge and onto the highway, when they were injured by defendant's trains, as Code, § 2055, allowing such damages to be recovered of any corporation "operating a railway and failing to fence the same," requires the track, and not necessarily the right of way, to be fenced.

Appeal from district court, Marshall county; Obed Caswell, Judge.

Action to recover double damages for cattle killed by a train on defendant's railway because of the alleged failure to fence at a point where the right to fence existed. A jury was waived, and trial had to the court. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

Anthony C. Daly, for appellant.

Binford & Snelling and Hubbard, Dawley & Wheeler, for appellee.

Waterman, J. The case was tried upon an agreed statement of facts. It appears that plaintiff's cattle were struck and killed upon a highway crossing. For a short distance west of the place of the accident the highway runs parallel with the track and adjoining the right of way. At a point not far west of the crossing, both railway and wagon road pass over a small creek. The railway crosses on a high bridge of two spans. Except in extreme floods there is water under only one span of the railway bridge. The fence along defendant's right of way was built up to a point opposite each abutment, and connected with the abutment by wing fences. There was no fence or barrier across in front of the bridge. One Bratt owned the land immediately north of the bridge, and plaintiff's cattle were in a pasture which adjoined Bratt's land on

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\*See notes at end of case.

## Notes

the north. There was a break in the fence between plaintiff's pasture and the land of Bratt, and the cattle, escaping through this, walked down under the bridge, and onto the highway, and upon this to the railway crossing, where they were struck and killed by a train on defendant's road. The bridge was so high that cattle could not get upon the railway at that point. It was a fence within the meaning of the statute (Code, § 2055), as this court has heretofore construed it. *Hilliard v. Railway Co.*, 37 Iowa, 442. But plaintiff insists that the right of way should be fenced so that live stock could not cross it. We think it is the track that is to be fenced, and not the right of way. If the track is protected at all points where the railway company has the right to fence by a lawful fence or its equivalent, the statute is complied with. *McCracken v. Railway Co.*, 91 Iowa, 711, 58 N. W. 1085. If plaintiff is correct that the fence should have been run across the creek bed on either side of the bridge to bar the passage of stock to the highway, then it is the highway that the railway company is obliged to fence. In our opinion, the fence which a railway company is called upon to build is for the purpose of keeping live stock off its track, and not to aid in confining them in an inclosure. That it often, and, indeed, usually, serves this double purpose, does not affect the question. Its duty is a single one, and, when performed, absolves it from liability. Of course, the company cannot, in fencing its track, leave out a part of its right of way so as to form a trap for cattle, as was said in the *McCracken Case*; but no such thing was done here. Its track was protected according to statute, but it seems this did not bar the way to the wagon road. For this the railway company was not legally to blame. The judgment was right, and it is affirmed.

## NOTES.

**Cow Passing through Culvert—Liability under Statute Requiring Track to Be Fenced.**—A railroad company is liable for injuries to a cow which escapes from adjoining lands to the track through an open culvert, though it appeared that the culvert was sufficient to turn stock at the ordinary height of water. *Keliher v. Connecticut River R. Co.*, 107 Mass. 411.

**Hogs Passing through Culvert—Liability under Statute Requiring Track to Be Fenced.**—A railroad company leaving open a culvert under its right of way, through which stock may pass to adjoining fields, fails to discharge its duty under section 2611, Rev. St. of Missouri, requiring railroads to fence their tracks, and authorizing a recovery for double the amount of damages sustained by reason of stock entering adjoining lands in consequence of an insufficient railroad fence. *Kingsbury v. Missouri, etc., Ry. Co. (Mo.)*, 19 Am. & Eng. R. Cas., N. S., 719.

Galveston, etc., Ry. Co. v. Kieff

## GALVESTON, H. &amp; S. A. RY. CO.

v.

KIEFF.

*(Supreme Court of Texas, Jan. 28, 1901.)*

[60 S. W. 543.]

**Railroads—Negligence—Due Care—Moving Car in Street—Lack of Warning—Slight Danger.\***—Where a boy of 13 years crossing a railroad track in a street sustained injuries by being struck by a car which was being pushed by the railroad's servants at the rate of about a mile an hour, without warning, there could be no recovery, though the servants, just before starting the car, saw the boy seven or eight feet from the track, since they had a right to assume that he would avoid injury, the danger being so slight.

Error to court of civil appeals of Fourth supreme judicial district.

Action by Edmund Kieff against the Galveston, Harrisburg & San Antonio Railway Company. A judgment in favor of plaintiff was affirmed by the court of civil appeals (58 S. W. 625), and defendant brings error. Reversed.

Upson, Newton & Ward, for plaintiff in error.

Webb & Finley, for defendant in error.

Gaines, C. J. This action was brought by James Kieff, as next friend of Edmund Kieff, against the Galveston, Harrisburg & San Antonio Railway Company, to recover damages for personal injuries. The plaintiff recovered a judgment, which was affirmed upon appeal. The following facts, except as to the immediate manner of the accident, appear by the uncontroverted testimony in the case: On the day of the accident the foot of the plaintiff, a lad then 13 years of age, was run over, and his big toe crushed, by a car of the defendant. The car which caused the accident was a flat car, which was loaded with material for the construction of a fence around defendant's yard, and had been put in position by an engine and left upon the track for convenience in constructing

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\*As to contributory negligence of minors, see *notes*, 19 Am. & Eng. R. Cas., N. S., 355 *et seq.*

As to the right of trainmen to presume that a person seen on the track will leave to escape train, see *note*, 19 Am. & Eng. R. Cas., N. S., 119 *et seq.*

## Galveston, etc., Ry. Co. v. Kieff

the fence. The work was intrusted to a gang of laborers, five in number, according to the evidence of the defendant, and not more than six or seven as testified to by the plaintiff and his witnesses. The manner of doing the work was for the workmen to push the car along the track to the point or points where it was to be unloaded. The parents of the plaintiff resided at a place about 240 feet south of the track. Just before the accident, the plaintiff was on the north side of the track, six or seven feet from the car. He started across the track to go to his home, and just before or about the time he did so the car was set in motion by being pushed along by the men who were engaged in constructing the fence. According to the testimony, the speed at which it could have been pushed did not exceed one mile per hour. The plaintiff himself testified: "I was 6 or 7 feet from the flat car. I mean the one by which I was hurt. My mother called me, and I wanted to go home, and as I was half way across [the track] the Mexicans pushed the flat car on me, and knocked me over, and my foot caught in the wheel, and they pushed the car on. I saw the Mexicans coming down from the other car, but I did not know what they were going to do. When I started across the track, the car was not moving at all. I did not know the Mexicans were going to push the car. When the Mexicans pushed the car, they were all back of the flat car. No one was on the front part of the flat car." And again, upon cross-examination, "The car was being moved by the men,—shoved along slightly." A witness for defendant also testified without contradiction that the material which was upon the cars and which was used for the construction of the fence consisted of "4 by 6 cypress posts and 1 by 6 and 1 by 8 pine. This material was loaded in both box and flat cars. We had some men there building the fence. The cars were originally brought up there in the yard by steam, but after they were got there they were moved by hand. The flat cars are of different capacities, the loads on which weighed from twenty-five to sixty-five thousand pounds,—that is, the load; and the car weighs from sixteen to twenty thousand pounds. The total weight would be from fifty to seventy-five thousand pounds. It is possible for five or six men to move a car in this yard by hand. They start it with a pinch bar, and when they were once gotten in motion they would shove them. A pinch bar is a bar with a point on the end and heel to it to keep it from slipping, and by pinching it is meant working it up and down under the wheels. The motion of a car moved in that way, when it first started off, would be very slow." It was a controverted fact whether the place of accident was in a street or not; but, in the view we take of the case, it may be assumed for the purposes of the opinion that the plaintiff was not a trespasser in crossing the track at the point where he attempted to cross. Evidently it was not a frequented street, if a street at all.

## Galveston, etc., Ry. Co. v. Kieff

It was assigned as error in the court of civil appeals that the trial court should have granted a new trial on the ground that there was no evidence of negligence, and the same assignment is insisted upon in this court. The mere fact that the car was left standing in a street (assuming it to be a street) was not an act of negligence as to this plaintiff. If there was negligence at all as to him, it was in the manner and circumstances of propelling the car. The moving of a car over the track of a railroad company along or across a public street is in itself a lawful act, but may become negligent from the attending circumstances and the manner of its movement. The negligence which results in an actionable wrong is the failure to discharge a duty owed to the party injured. It is a duty incumbent upon all men to use ordinary care so to act as not to injure others. The duty arises when there is reason to anticipate danger. The rapid propulsion of cars drawn by steam or other locomotory engines over a railroad track is calculated to endanger the lives of persons on or very near the track, so that in crossing the streets of a city, or a public road, or other much frequented way ordinary prudence dictates that those operating the train or cars should take precautionary measures to guard against such danger. In such cases the question of negligence is one of fact which is to be determined by a jury. But here we have a very different case. The movement of a car at a speed of a mile per hour is not dangerous to a person of any reasonable discretion, who is in possession of his senses and the use of his limbs. How, then, can it be said that the men operating the car in question should have anticipated danger from its movement? They saw the plaintiff near the car, and, while they must have known that he was a boy at the time, they had the right to conclude that he was of sufficient discretion to avoid injury where the danger was so slight. Since they had no reason to apprehend danger to the plaintiff, they were not negligent in moving the car. *Power Co. v. Lefevre* (Tex. Sup.) 57 S. W. 640; *Douglass v. Railway Co.*, 90 Tex. 125, 36 S. W. 120, 37 S. W. 1132; *Railway Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162; *Railway Co. v. Cocke*, 64 Tex. 151. The principles announced in the cases cited are decisive of the question. The trial court should have instructed a verdict for the defendant, and, having failed to do so, should have granted the motion for a new trial. The judgment is accordingly reversed, and the cause remanded.

NOHRDEN

v.

NORTHEASTERN R. Co.

(*Supreme Court of South Carolina, Nov. 27, 1900.*)

[37 S. E. 228.]

**Accident at Crossing—Contributory Negligence—Burden of Proof—Statute.**—Under Rev. St. § 1692, declaring that a railroad company shall be liable for injuries at a crossing when it appears that the company's neglect to give the signals required by statute contributed to the injury, unless it is shown that the person injured was guilty of gross negligence, and that such negligence contributed to the injury, the plaintiff is not bound to negative by testimony such conduct on his part as would defeat a recovery, but the burden of showing such contributory negligence is on defendant.

**Same—Gross Negligence of Traveller—Sufficiency of Evidence.**—That a person injured at a railroad crossing knew of the train's approach in time to avoid the collision does not necessarily show gross negligence on his part.

**New Trial—Conduct of Judge.**—Remarks by the judge in charging the jury in an injury suit that, if he failed to state the law correctly, the party injured thereby had a remedy by appeal, and that the supreme court had granted a new trial once because of the court's error in charging the jury that they might give punitive damages, were not calculated to induce the jury to believe that the former jury had found a correct verdict under a proper charge, with the single exception of the mistake as to punitive damages, and hence did not violate the rule that references to the former verdict calculated to influence the jury on the new trial are improper.

**Action for Wrongful Death—Damages—Instructions.\***—In an action for causing the death of plaintiff's son, failure to define the meaning of Rev. St. § 2316, providing that the jury may give "such damages as they may think proportioned to the injury," was not ground for reversal, where no request was made therefor, and the court charged the jury in the language of the statute, and gave the construction placed on it by the supreme court, and also charged that the jury could not give punitive, but only compensatory, damages.

**Appeal—Exceptions—Review.**—An exception based on a failure to give an instruction will be disregarded on appeal where the particular instruction omitted is not stated.

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\*As to the right to recover damages, in an action for wrongful death, as a solatium for the wounded feelings of the relatives of deceased, see extensive note, 11 Am. & Eng. R. Cas., N. S., 755 *et seq.*



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**Accident at Crossing—Failure to Give Signals—Contributory Negligence in Attempting to Board Moving Train in Violation of Ordinance—Instructions.**—Where the jury in an action against a railroad company for injuries at a crossing were instructed, in the language of Rev. St. § 1692, that if a person is injured at a crossing, and it appears that the company neglected to give the signals prescribed by statute, the company was liable, unless it is shown that the person injured was “acting in violation of law, and that such unlawful act contributed to the injury,” and were also instructed that a city ordinance made it “unlawful” for any person not an employee to go on or off the cars or locomotive while the same were in motion within the corporate limits of the city, failure to charge that the violation of the ordinance would be such a violation of the law as would defeat the action was not ground for reversal, when no request therefor was made.

Appeal from common pleas circuit court of Charleston county; George W. Gage, Judge.

Action by William C. Nohrden, as administrator of H. W. Nohrden, deceased, against the Northeastern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The following is the trial judge’s charge:

“Gentlemen of the Jury: Before I proceed to deliver to you my charge in this case, I will direct my attention to the requests to charge made, first by the plaintiff, and secondly by the defendant; and that means this: The plaintiff’s attorney (that is, the attorneys for Nohrden) have their view of the law of the case, and the defendant’s attorneys (that is, the attorneys for the railroad company) have their view of the law; and they have a right, under the law, to request me to state their views to you, and to direct you to find according to their view of the law. So that, if I fail to state the view of the law entertained by these gentlemen, they would thereafter have a remedy, to wit, by appeal to the supreme court, and have the judgment reversed and a new trial ordered, and have the case tried according to their view of the law. That has been the case in this case once heretofore. This action was tried before a former circuit judge, and he directed the jury on that trial his view of the law, and that view was contrary to that entertained by the counsel for the railroad company; and for that reason the supreme court, at Columbia, set the verdict aside, and ordered a new trial of this case according to the view of the law declared by the supreme court, which governs this court in all subsequent trials. Now, so much for an explanation of the law I am about to read to you now.

“The attorneys for the Nohrdens request me to state this to you, as the law: ‘First. That the foundation of the plaintiff’s claim is negligence. That negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such

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a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. Second. If the jury find from the evidence that the plaintiff's intestate was killed as alleged in the common-law counts of his complaint, and that the negligence of the defendant was the proximate cause of the injury resulting in the death of the plaintiff's intestate, then the verdict should be for the plaintiff, unless the jury find from the evidence that the plaintiff's intestate did not use ordinary care on the occasion of his injury, having reference to the surrounding circumstances.' Fourth. The common law requires the giving of such signals at highway or public street crossings as are reasonable, in view of the situation and surroundings, to put individuals using the highway or public street on their guard. The signals required by the statute do not supersede these reasonable signals which were before necessary. They do not take away the common-law right of action by giving in lieu thereof a new cause of action under the statute, but simply declared what were proper signals, and expressly make them cumulative. Fifth. That the law requires that a bell of at least thirty pounds weight, and a steam whistle, shall be placed on each locomotive engine, and the bell shall be rung or the whistle sounded by the engineer or fireman at the distance of at least five hundred yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine has crossed such highway or street or traveled place; and, if the engine or cars shall be at a standstill within a less distance than one hundred rods of such crossing, the bell shall be rung or the whistle sounded for at least thirty seconds before the engine shall be moved, and shall be kept ringing or sounding until the engine shall have crossed such public highway or street or traveled place. Sixth. The law further provides that if a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this article, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine, recoverable by indictment, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was at the time of the collision guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury. Seventh. If the jury find from the evidence that the defendant failed to give the statutory signals, and that such failure contributed to the injury complained of, the plaintiff is entitled to recover, unless it is shown that, in addition to mere want of ordinary care, the person injured, or the person having charge of his person, was at the time of the

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collision guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury. Eighth. Gross negligence is the absence of that kind of care which even a careless and indifferent person would be expected to exercise under existing circumstances. Ninth. A man approaching a railroad crossing at a highway, street, or traveled place has a right to rely upon the railroad giving the signals required by statute for that place.' 'Eleventh. The statute of this state does not speak of pecuniary loss or injury, which might possibly tend to show that the injury for which the damages are allowed was confined to the deprivation of some legal claims susceptible of measurement by a pecuniary standard, but its language is much broader, and gives to the jury the right to award such damages as they may think proportionate to the injury resulting from such death; and it is quite certain that the beneficiaries of the action may sustain injury by death of a relative over and above the loss of any legal claim which they may have upon such relative.' All of those requests, I charge you, are proper. [At this point, counsel for plaintiff asked the court to charge the jury that new trial was granted merely on the question of the measure of damages. His honor said he would do so when he came to give his view of the law.]

"The requests by the defendant are these: 'First. No damages at all can be recovered in this case unless the jury find from a preponderance of the testimony that the injury resulted from negligence of defendant. Second. If the jury believe that Harold William Nohrden was at the time of the accident guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury, even though the company was negligent in failing to give the required signals, their verdict must be for the defendant.' I charge you both of those propositions, gentlemen, except to say this: That the matter of unlawful act, neither was the matter of gross contributory negligence, pleaded by the answer, but evidence tending to establish them has been introduced, and introduced without objection, and I understand from the counsel for the plaintiff that there is no objection to the jury considering these matters. Therefore I charge them. 'Third. If the jury find from the evidence that Harold William Nohrden was on defendant's railroad track, attempting to cross in either direction, and that the place on the track where he attempted to cross and was struck was not on the crossing, but only near to it, or a short distance therefrom, in the yard of the company, then the railroad company was not under any statutory duty towards Nohrden to blow its whistle or ring its bell.' I charge you that as correct; also, the next two propositions, numbered 5 and 6: 'Five. If the jury find from the evidence that the place where Nohrden was killed was not a public crossing or traveled place, in the sense of

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the statute, and that no signals were given, yet if they further believe that Nohrden could, by listening and looking, by the exercise of ordinary care, have seen or heard the approach of the train, and an ordinarily prudent person would under the same circumstances have looked and listened, and could have thereby avoided the injury, then plaintiff cannot recover, if he neglected to do so, and attempted to cross the track, and while doing so he received the injury which caused his death. Sixth. If the jury find that the statutory signals were not given, that does not make the company liable, if Nohrden knew without such signals that the train was approaching, yet notwithstanding such knowledge he attempted to cross in the face of the train, or to board the train.' And this important addition, not by myself, but by the counsel who proposed the request: 'And the jury believe that only a grossly careless person would have so acted under the circumstances,'—you being the judges of that fact. The seventh proposition I decline to charge. [The seventh proposition, as submitted, read as follows: "In order to prove that the failure to give signals contributed to the accident, the plaintiff must show that his intestate was not aware of the train's approach in time to have avoided the collision, for the only object of a signal is to give such notice. Unless, therefore, a preponderance of the evidence satisfies you that the deceased did not know of the train's approach in time to have avoided the accident, you must find for the defendant."'] The eighth, ninth, tenth, eleventh, and twelfth propositions I charge, as follows: 'In order for the plaintiff to recover in this case for failure to give statutory signals, he must not only satisfy you by a preponderance of the evidence that the injury occurred at the crossing, but also that there was a failure to give the statutory signals. If the jury believe that the preponderance of the evidence shows either that the statutory signals were given, or that the injury did not happen at the crossing, the railroad is not responsible for the alleged failure to give said statutory signals. If, therefore, the jury believe that the deceased knew of the train's approach in time to have avoided the accident, and that the testimony shows that the accident was caused in some other manner than by a failure to give the signals, such failure would give no cause of action against the railroad, even though they believe Nohrden was struck at the crossing. If the jury believes that young Nohrden knew of the approach of the train, and went upon the crossing for the purpose of boarding the car, then the statutory signals were not required, and the company is not responsible, even though the jury believe that the injury happened at a crossing, because the statutory signals are only intended to protect those who are on a crossing, intending to cross. If the jury believe that Nohrden was on the crossing, not intending to cross the street, but for the purpose of attempting to board the moving train, and lost his life in attempting to get on the moving car, then he was a trespasser,

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and was the author of his own injury, and the company is not responsible. A person who obtrudes himself upon a railroad train may be a trespasser, even though the company has no notice of such obtrusion, and does not object, even when no injury is done to the property of the railroad company. The city ordinance (section 605) put in evidence contains no proviso similar to the proviso of section 1692 of the Revised Statutes. Therefore no such presumption of negligence is raised by a failure to comply with the requirements of that ordinance as is raised by a failure to comply with the requirements of that section of the Revised Statutes. It is not negligence per se for a railroad company not to have a red light at a crossing in advance of an approaching railroad train.' Then I add, in my own language, the jury must determine whether any failure to observe that ordinance was negligence, and, if so, was it a proximate cause of the accident? 'Thirteenth. Section 609 of the Revised Ordinances makes it unlawful for any person not employed by railroad company to get on or off their cars or locomotives while the same are in motion.' And, I add, within the corporate limits of the city. 'Fourteenth. The Northeastern Railroad Company have the right to use their yard and tracks to shift back and make up their trains. The employees of the railroad are not bound, especially in the company's yard, and while moving their cars at a comparatively low rate of speed, to stop their cars in their yard because a man is seen, or might be seen, standing by the track upon which the train is moving. Law and common sense presume that a man will get out of the way of a train.'

"Now, gentlemen, those are the requests to charge, first by the plaintiff, on one side, then by the defendant, on the other. I have passed upon them, and, if I made a mistake, as I have no doubt I have, the counsel have their remedy by appeal to the supreme court. I will now proceed to tell you in my own way, and briefly as I can consistently with clearness, my views of the law of this case, because the issues in it are very few. You can state and restate in manifold ways one proposition, gentlemen, so that it not only makes a jury dizzy, but makes a lawyer dizzy, and loses me, I am sure.

"Now what is this action about? This is a suit by Mr. Wm. C. Nohrden against the Northeastern Railroad Company to recover damages for the death of his boy some time in September, 1897. It is such a suit as at common-law— That is, before our legislature passed any statute on the subject, such a suit as could not be maintained. In other words, it was such a suit as died with the person who was killed, and did not survive to his kin or anybody else. But the legislature some years ago, within the last half century, passed an act by which it gave to certain persons—in this case to the father—the right to bring a suit for the death of his son; and that act, or the gist of that act, is in these words: 'The jury may give in that suit such damages as they may think proportioned to

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they brought their baggage, when they came. Those are the four acts of negligence charged by the plaintiff. The defendant, the railroad company, comes into court, and by its answer admits it is a corporation, but denies every one of those things I have read, and thereby puts them at issue, and makes it necessary for the plaintiff to prove to you by a preponderance of the testimony the four acts of negligence which I have read here in your hearing.

"Now, gentlemen, I might stop right there, and I have no doubt you would have a clearer view of this case than if I went any further, but perhaps I better say more. As I told you, the plaintiff has stated these four acts of negligence. The plaintiff brings the case, and must prove these acts by a preponderance of the testimony; that is to say, the testimony in favor of the plaintiff must, in force and effect in the minds of the jury, outweigh the testimony against it, in order for the plaintiff to recover. If you find the testimony in favor of the plaintiff's claim does outweigh the testimony against it, find a verdict for the plaintiff. If you are of the opinion that the testimony of the defendant, denying these acts of negligence charged, outweighs the testimony of the plaintiff, then you will find a verdict for the defendant. In either case, sign your name as foreman.

"Now, about the common-law ground of negligence: It is charged here by Mr. Nohrden that on that night there was a public highway running across this city, called 'Columbus Street'; that his son had a right to use that highway; that the whole public had the right to travel that highway. He charges that while his son was traveling that highway the railroad company came across that highway with its cars, and that the two met upon that highway, and that one struck the other and killed him. Now, Mr. Nohrden charges that, while the railroad had a right to cross that highway, it had a right only to cross it recognizing the right of the public to cross it too, and the plaintiff charges that the railroad company was guilty of negligence in the way it crossed it. Now, what does that mean? As I told you in the beginning, the gist of this action is negligence. Now, when you come to consider negligence,—and the act here is charged to be an act of commission; that is, the charge is that the railroad company ought to have done something which they did not do; that is, to give some sort of signal to this boy when they were backing back over that common highway,—in order to find whether or not they were negligent, you have to fix in your mind a standard, and what is that standard? Because negligence implies that a man has done something he ought not to have done, or failed to do something he ought to have done. The standard is that, not a man of extraordinary care or intelligence, but of an ordinary man, of ordinary prudence and intelligence, or an ordinary railroad company. Now, would a railroad company of ordinary care, operating a railroad on

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that night, like the defendant operated its trains, have done what the railroad company did on that night, crossing that track, or did this company fall short of what an ordinary man would have done? If this railroad, crossing that place that night, fell short of the conduct which the law holds the ordinary man up to, that is what the law calls 'negligence'; that is, the failure to do what an ordinary man under like circumstances and situation of the case would have done and ought to have done. Now, whether the railroad company did on that night fail to do what the ordinary man would have and should have done, you must decide. I cannot help you. You must take all of the testimony and fix it in your mind, and say whether or not the railroad company came up to that standard fixed by the ordinary man. If it did, then it should go free. If it did not, then it should not go free. Whether it did or not is a question for you, and not for me.

"The other questions of negligence here are not common-law negligence, but what is called 'negligence for violation of statute.' The legislature has prescribed how railroads shall cross crossings, and for this reason: There are railroads all over the country, and they are crossing public highways all over the country. A man has a right to travel on a public highway, and a railroad company, when it gets its charter, has a right to cross it. And it is the dictate of reason that, when two persons use a crossing, each must use it with reference to the rights of the other. Now, where the two cross is a road where the public has a right and where the railroad company has a right to be, and each must use it with reference to the right of the other to be there. A statute has prescribed how a railroad must cross a public highway; that is to say, in the language of the act I have read to you, they must, for so many yards before they cross it, ring their bell, or blow their whistle, or, if within a less distance than that, to wit, so many rods, as I have read, they must ring their bell or blow their whistle continuously, for what? In order to notify the public who use that place that they are coming to use it, and so avoid accident. That is the object of the act. Our courts have gone on and considered that act to mean this: That if a railroad company fail to do that thing,—fail to ring their bell or blow their whistle,—and an accident occurs, the presumption is it occurred from the negligence of the railroad company if it occurred on a crossing, because that provision was made to protect the rights of each party on a crossing. It is for you to say whether the railroad company did give these signals or not. If it did, it complied with the law. If it did not, it violated the law. Whether they did or not is a matter for you. If it did not, and this boy was thereby killed, the law implies negligence to them and the plaintiff is entitled to recover, unless, under the language of the statute, these things happened; unless the boy was guilty of gross negligence, or unless he was violating the law. Now, what is gross negligence?

I have defined to you what negligence is. Negligence is the failure of a man to come up to the standard of an ordinary man. Now, gross negligence is something short of that. It is an act which an indifferent man would be guilty of, and if this boy was guilty of not only a lack of care, but a considerable lack of care, a greater lack of care, such a lack of care as would make him grossly negligent, then that defeats his action, under the very language of the statute. Whether or not he was guilty of that sort of conduct is a question for you. You have heard the testimony. Fix in your minds what a negligent man and what a grossly negligent man are, and, if this boy was grossly negligent on that night, that defeats his action. Or, the statute goes on to say, if he was violating the law. Now, gentlemen, I am very candid to say to you that I do not know exactly what that means. If he had violated a statute of the state, I would say that was a violation of the law, or, if he was violating the common law, I would say that was a violation of the law, or, if he was guilty of a criminal act under the laws of the country, statute or common, I would say whether that was a violation of the law. That would be a violation of the law. But it is not necessary for me to decide in this case, and I am not going to decide in this case, questions that I am not requested to decide, unless it is necessary to enlighten you. And I have not been requested to say whether or not the violation of a city ordinance, if the boy did violate it, was such a violation of the law as would defeat this action. I am not going to do it, for this reason, gentlemen: Because, as I say, I have not been requested to do it. And, with these jury trials, the law has got to be so voluminous and so complex, and in so many books, that a man fairly gets dizzy in its mazes; and, where a case is well fought on both sides,—astute lawyers, who know the law, and have many months to prepare these cases,—it is practically impossible for a circuit judge, on a hearing like this, to state the law in all its limitations, and a failure to state it according to how it may be would be an error of law, and would entitle the party who appeals therefrom to a new trial. For that reason I am not going to look up questions of law in this case which we are not obliged to decide. That is a direct and frank statement, so far as I am concerned.

“Now, gentlemen, as to the matter of damages: You heard some little skirmishing between counsel, and some oral requests to me to make certain charges. I charge you in the language of the statute, and in the language of our supreme court, again avoiding any unnecessary difficulty, and that is this: That, when a jury comes to give damages, they may give such damages as they think proportioned to the injury. To what injury? To the death of the boy. To whom? To the party who brings the action, to wit, the father of that boy. Now, if I were to go to work to tell you what sort of damages,—to define what such damages were,—I might be in the same



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plight some judges are who define a 'reasonable doubt.' There is the language. 'Such damages' is plain English, and you know what it means as well as I do. That is what the statute says, and that is what it means.

"Now, as to the form of your verdict: If you find for the plaintiff, say, 'We find for the plaintiff,' and express the amount in words, and sign your name as foreman. If you find for the defendant, say, 'We find for the defendant,' and sign your name as foreman.

"Now, as to the ground of this new trial: When this case was tried before a jury before, the circuit judge charged that the jury might give punitive damages; and the jury found a verdict, and the supreme court says that was error,—that the jury could not give punitive damages. Now, what are punitive damages, gentlemen? To illustrate it in a plain way, it is this: If a man walks up to you in a public street, in a public place, and breaks your nose with his fist, the actual damage may not be very much to you. It might be repaired, and you might be as well as you ever were before. But if he does it in a spirit that is willful, that is reckless, that is careless of the rights of his fellows (in other words, if he does it in a mean spirit, what the law calls 'willful'), then you could sue him, and recover not only for the broken nose, but for his willfulness, and the law gives what is called punitive damages (that is, smart money), not only to repair the damage done to you, but to inflict a penalty by the lash upon his back. That is the difference between the two. So the supreme court has held that in a case like this, where the statute gives the right to the relative of a dead man, you cannot give such a verdict as will punish the railroad company for willful wrongdoing, but you must confine your verdict to such damages as may be proportioned to the injury,—what is called, in law, 'compensatory damages.'

"Now, gentlemen, whatever your verdict is, take it and write it. It is proper for me to say to you here, inasmuch as this is the first charge I have made to you, that the position of a judge and the position of a juror is always a very solemn position, and ought to raise in us the highest and best purposes. Counsel on each side here fight for their clients, and fight nobly; and it is a thing for which we should all be thankful, that when we get into trouble we can employ learned counsel. But they represent their clients, as the law intends they should do. You and I represent, as nearly as poor, weak mortals can; justice; that is to say, we sit here to judge between them, and to do what is right between our fellow citizens. With that admonition, gentlemen, take the record and find your verdict.

"Mr. Fitzsimons: Did I understand your honor to charge that in order to be protected by the statutory requirements, one must be upon the crossing, intending to cross, or not? His Honor: Yes, sir; that is what I charge them."

The following exceptions were duly served by defendant:

"First. His honor, the circuit judge, erred in refusing to charge the seventh request submitted by defendant upon the statutory signals, to wit: 'Seventh. In order to prove that the failure to give signals contributed to the accident, the plaintiff must show that his intestate was not aware of the train's approach in time to have avoided the collision, for the only object of a signal is to give such notice. Unless, therefore, a preponderance of the evidence satisfies you that the deceased did not know of the train's approach in time to have avoided the accident, you must find for the defendant.' It is submitted that defendant was entitled to this request, which embodies the principle laid down in *Barber v. Railroad Co.*, 34 S. C., at page 451, 13 S. E. 632, which holds: 'The manifest object of requiring the signals is to give notice to persons crossing or wishing to cross a railroad track, in order that they may keep out of the way of an approaching train; but, if they know of the approach of the train without any signal being given, where is the necessity for such signals, and how could it be said with any propriety that the failure to give them contributed in any way to the disaster? The fact that the train was running rapidly—from 20 to 25 miles an hour—is no evidence of negligence, in the absence of other circumstances.'

"Second. We submit that a new trial is a trial *de novo*, and should be conducted, as far as possible, as if no prior trial had taken place; that references to the former verdict against the company, which was set aside, are not only unnecessary and prejudicial, but also improper and illegal, particularly in a damage suit. Therefore we submit that his honor, the circuit judge, erred in charging as follows: 'So that, I failed to state the view of the law entertained by these gentlemen, they would therefore have a remedy, to wit, by appeal to the supreme court, and have the judgment reversed and a new trial ordered, and have the case tried according to their view of the law. That has been the case in this case once heretofore. This action was tried before a former circuit judge, and he directed the jury on that trial his view of the law, and that view was contrary to that entertained by the counsel for the railroad company; and for that reason the supreme court, at Columbia, set the verdict aside, and ordered a new trial of this case according to the view of the law declared by the supreme court, which governs this court in all subsequent trials.' Again, at the conclusion of the plaintiff's request the counsel for plaintiff asked the court to charge the jury that a new trial was granted merely on the question of the measure of damages. His honor said he would do so when he gave his view of the law, and later on in his charge he used the following language: 'Now, as to the ground of this new trial: When this case was tried before a jury before, the circuit judge charged that the jury might give punitive damages, and the

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jury found a verdict, and the supreme court says that was error; that the jury could not give punitive damages.'

"Third. We submit that it was error in his honor, the circuit judge, to charge that the new trial in this case was granted merely on the question of the measure of damages. The record in the appeal court shows that there were a number of exceptions to the charge upon the former trial, which exceptions were not considered. See *Nohrden v. Railroad Co.*, 54 S. C. 498, 32 S. E. 524. These exceptions, not then considered, would have resulted in a new trial, without reference to the question of damages, if Judge Gage's view of the law of negligence be correct, because the case on appeal in this court shows that these exceptions, not then passed on, embraced requests which were refused by Judge Buchanan upon the first trial, and yet charged as correct by Judge Gage on the second trial. We submit, therefore, that it was unjust to charge that the only reason for setting aside the former verdict was upon the question of damages, when Judge Gage's own charge indicates that the former verdict would have been set aside upon the other exceptions, not then passed upon, without reference to the question of punitive damages. The natural and only inference to be drawn by the jury from this error was that a former jury had found a verdict under a proper charge, with the single exception of the mistake as to punitive damages, which was not the case.

"Fourth. Upon the question of damages his honor, the circuit judge, charged as requested by plaintiff in his eleventh request, to wit: 'Eleventh. The statute of this state does not speak of pecuniary loss or injury, which might possibly tend to show that the injury for which the damages are allowed was confined to the deprivation of some legal claims susceptible of measurement by a pecuniary standard, but its language is much broader, and gives to the jury the right to award such damages as they may think proportionate to the injury resulting from such death; and it is quite certain that the beneficiaries of the action may sustain injury by death of a relative over and above the loss of any legal claim which they may have upon such relative.' And, continuing upon this question of damages, he charged: 'Now, gentlemen, as to the matter of damages: You heard some little skirmishing between counsel, and some oral requests to me to make certain charges. I charge you in the language of the statute, and in the language of our supreme court, again avoiding any unnecessary difficulty, and that is this: That, when a jury comes to give damages, they may give such damages as they think proportioned to the injury. To what injury? To the death of the boy. To whom? To the party who brings this action, to wit, the father of that boy. Now, if I were to go to work to tell you what sort of damages,—to define what such damages were,—I might be in the same plight some judges are who define a "reasonable doubt." There is the language.

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"Such damage" is plain English, and you know what it means as well as I do. That is what the statute says, and that is what it means.' We submit that his honor, the circuit judge, erred in charging as above quoted, because: (a) It is the constitutional duty of the court to declare the law, and having undertaken to do so, at the request of the plaintiff, by indicating what damages could be recovered, it was his duty to state the limitations of the law, and not submit the matter to the jury. (b) Because it was the duty of the court to consider and declare the law, and not simply charge in the language of the statute; and, after undertaking to explain the statute, it was error to say to the jury, "'Such damages" is plain English, and you know what it means as well as I do. That is what the statute says, and that is what it means.' (c) Because, in so charging, the court submitted a question of law for the decision of the jury.

"Fifth. We submit that facts are for the jury, and law for the court, and it is the duty of the court to consider and construe the law; and his honor, the circuit judge, therefore erred in saying to the jury that he did not know exactly what the law meant, in that he charged as follows: 'Or, the statute goes on to say, if he was violating the law. Now, gentlemen, I am very candid to say to you that I do not know exactly what that means. If he had violated a statute of the state, I would say that was a violation of the law, or, if he was violating the common law, I would say that was a violation of the law, or, if he was guilty of a criminal act under the laws of the country,—statute or common,—I would say whether that was a violation of the law. That would be a violation of the law. But it is not necessary for me to decide in this case, and I am not going to decide in this case, questions that I am not requested to decide, unless it is necessary to enlighten you. And I have not been requested to say whether or not the violation of a city ordinance, if the boy did violate it, was such a violation of the law as would defeat this action. I am not going to do it, for this reason, gentlemen: Because, as I say, I have not been requested to do it. And, with these jury trials, the law has got to be so voluminous and so complex, and in so many books, that a man fairly gets dizzy in its mazes; and, where a case is well fought on both sides,—astute lawyers, who know the law, and have many months to prepare these cases,—it is practically impossible for a circuit judge, on a hearing like this, to state the law in all its limitations, and a failure to state it according to how it may be would be an error of law, and would entitle the party who appeals therefrom to a new trial. For that reason I am not going to look up questions of law in this case which we are not obliged to decide. That is a direct and frank statement, so far as I am concerned.'

"Sixth. It is submitted that it is error for the court to refuse to construe and declare the law because 'the law has got to be so voluminous and complex, and in so many books, that

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a man fairly gets dizzy in its mazes,' and because 'a failure to state the law in all its limitations,' and because 'a failure to state the law according to how it may be, would be an error of law, and would entitle the party who appeals therefrom to a new trial.' We submit that such refusal to charge the law applicable to the case is just as erroneous as to charge the law incorrectly. It was the duty of the court to say whether or not a violation of the city ordinance was such a violation as would defeat the action. The third cause of action was based upon a part of said ordinance. The whole of said ordinance was in evidence without objection. The circuit judge, in summing up the different causes of action, includes this third cause as 'negligence arising from violation of a city ordinance,' and adds, 'If you find the testimony in favor of plaintiff's claim does outweigh the testimony against it, find a verdict for plaintiff.' A correct interpretation of the force and effect of this ordinance was in issue, and necessary to 'enlighten the jury,' and his honor's refusal to charge thereon was, we submit, error."

W. Huger Fitzsimons, for appellant.

Legare Holman and W. St. Julien Jervey, for respondent.

McIver, C J. This is an action to recover damages for the alleged negligent killing of the plaintiff's intestate by one of the trains of the defendant company on the 8th of September, 1897. The case came on for trial before his honor, Judge Gage, and a jury, and, a verdict having been rendered in favor of the plaintiff, the defendant appeals from the judgment entered upon said verdict, basing his appeal upon the several exceptions set out in the record. As these exceptions impute error to the circuit judge in his charge to the jury, it is proper that the charge, as well as the exceptions thereto, should be set out by the reporter in his report of the case.

The first exception charges the circuit judge with error in refusing to charge defendant's seventh request to wit: "Seventh. In order to prove that the failure to give signals contributed to the accident, the plaintiff must

Accident at Cross-  
ing—Contribu-  
tory Negligence—  
Burden of Proof—  
Statute.

show that his intestate was not aware of the train's approach in time to have avoided the collision, for the only object of a signal is to give such notice. Unless, therefore, a preponderance of the evidence satisfies you that the deceased did not know of the train's approach in time to have avoided the accident, you must find for the defendant." Inasmuch as the circuit judge, in response to defendant's sixth request, had instructed the jury that, if the signals required by statute had not been given, that would not make the defendant liable, if the deceased knew without such signals that the train was approaching, and yet notwithstanding such knowledge he attempted to cross in face of the train, or to board the train,

and the jury believed that only a grossly careless person would have so acted under the circumstances, it seems to us that the practical question raised by the first exception is whether the burden of proof is upon the plaintiff or upon the defendant to show whether the deceased knew of the approach of the train in time to have avoided the collision. By the express terms of the request the burden of proof is placed upon the plaintiff, for the language used is that "the plaintiff must show that his intestate was not aware of the train's approach in time to have avoided the collision," so that the practical inquiry is as to the burden of proof. We do not think that this burden is upon the plaintiff, for two reasons: (1) Because it would be requiring the plaintiff, in violation of the general rule, to prove a negative. (2) Because the knowledge by the deceased of the approach of the train in time to avoid a collision is a matter of defense, to be proved by the defendant, and not to be disproved in advance by the plaintiff. The statute (Rev. St. § 1692) provides that if a person is injured at a crossing by a collision with the engine or cars of a railroad corporation, and it appears that the corporation "neglected to give the signals required by this article (Rev. St. § 1685), and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, \* \* \* unless it is shown that, in addition to a mere want of ordinary care, the person injured \* \* \* was, at the time of the collision, guilty of gross or willful negligence or was acting in violation of the law, and that such gross or willful negligence, or unlawful act, contributed to the injury." From this language it is apparent that if a person brings an action for damages sustained by reason of a collision with a railroad train at a point where the railroad track "crosses any public highway or street or traveled place," and makes it appear that the railroad corporation neglected to give the signals required by statute, and that such neglect contributed to the injury, he is entitled to recover. But if it is shown that such person was at that time guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury, then he cannot recover. It is clear that the plaintiff in such a case is not bound to negative by testimony such conduct on his part as would defeat his recovery, but that the burden of proof is upon the defendant to show such conduct on the part of the plaintiff as would defeat his right to recover. The case of *Barber v. Railroad Co.*, 34 S. C. 444, 13 S. E. 630, cited by counsel for appellant, is not in point; for in that case there was no question as to the burden of proof, and could not have been, as it is stated at page 451, 34 S. C., page 632, 13 S. E., that, while there was evidence of negligence on the part of the defendant in failing to give signals required by statute, yet it could not be said that the injury complained of was the result of such negligence, in face of the admitted fact, testified

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to both by the party injured and by his companion, that he knew not only that the train was approaching, but that it was near at hand, before he attempted to cross the track. Then follows the quotation from that case, incorporated in the exception, to the effect that the manifest object of the statute in requiring the signals to be given was to give notice of the approach of the train to persons crossing or desiring to cross the track, and, if the plaintiff knew of the approach of the train, then such notice was not necessary. For the reasons thus indicated, there was no error in refusing the seventh request. There is, however, another reason why the request should have been refused, and that is the omission of the important addition made to the sixth request at the instance of counsel for plaintiff. It does not follow necessarily that the fact that the person injured knew of the approach of the train in time to avoid the collision would imply gross negligence on his part, and hence the seventh request could not, even if otherwise unobjectionable, have been granted, without adding what was added to the sixth request.

Same—Gross Negligence of Traveller—Sufficiency of Evidence.

The second and third exceptions impute error to the circuit judge in what he said to the jury in reference to the former trial of this case, and the disposition of the appeal from the judgment entered on such trial, and may be considered together. It is quite true that when a new trial of a case is ordered by this court such trial is a trial de novo,—so much so that incompetent evidence received at the former trial without objection, which thereby became competent on that trial, cannot be received on a new trial if objected to when offered (*Petrie v. Railroad Co.*, 29 S. C., at page 317, 7 S. E. 518, 519), and must be conducted, as far as practicable, as if there had been no previous trial. This, however, does not preclude the parties from agreeing to receive on the new trial either the whole or certain portions of the testimony taken at the previous trial, as seems to have been done in the case. But it would be improper to allow any reference to the action of the former jury calculated to influence the jury then trying the case. Each jury must act upon their own responsibility, and according to their own view of the testimony submitted to them, entirely uninfluenced by the action of any other jury. Indeed, it not unfrequently happens that the testimony adduced on a new trial is very different from that offered on the original trial, and hence it would be manifestly improper for the jury on a new trial to allow themselves to be influenced by the action of the former jury. With this preliminary statement of what we understand to be the true rule upon the subject, we proceed to inquire whether such rule has been violated in this case. The reference made by the circuit judge to the former trial in the first quotation from his charge, which is embraced in the second exception, was a mere illustration of

New Trial—Conduct of Judge.

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his statement to the jury that, if he failed to state the law correctly, the party injured thereby had his remedy by an appeal to the supreme court, and manifestly did not violate the rule; for there is nothing there said calculated to induce the jury to believe that they should pay any attention whatever to the action of the jury in the former trial. The second quotation from the judge's charge is nothing more than a statement, and a correct statement, of the fact that the supreme court had granted a new trial because of error on the part of the circuit judge who presided at the previous trial in instructing the jury that they might give punitive damages in a case of this kind. There is no allusion to the action of the former jury, except that they found a verdict under an erroneous instruction as to the law. It is true that the circuit judge, after disposing of the written request to charge submitted by counsel for plaintiff, was asked by said counsel to charge the jury that the new trial was granted merely on the question of the measure of damages, to which his honor replied that "he would do so when he came to give his views of the law." But, as matter of fact, he never did charge the jury that the new trial was granted "merely on the question of the measure of damages," but did charge the jury, as to this matter, in the language found in the second quotation from the charge embraced in the second exception. In this, as we have said, there was no error. The third exception, which is rather an argument than an exception, cannot, for that reason, be sustained; nor is the argument therein presented well founded. It must be kept in mind that the question presented by these two exceptions is whether Judge Gage said anything to the jury which was calculated to induce them to believe that it had been determined at the former trial that the plaintiff would have been entitled to a verdict but for the error on the part of the judge who presided at the former trial in instructing the jury that they might give punitive damages in a case of this kind. We do not see that there was anything in what Judge Gage did say to the jury which was calculated to induce any such belief. It does not appear that the jury were informed that there were any other exceptions to the charge of the judge who presided at the former trial, except that in regard to punitive damages; and they certainly were not informed, and could not have been informed, whether such other exceptions, if any, were well or ill founded, for this court in its former decision (54 S. C., at page 498, 32 S. E. 526) had expressly declined to consider any of the other exceptions. We do not see, therefore, how it is possible that the jury could have drawn the inference "that a former jury had found a verdict under a proper charge, with the single exception of the mistake as to punitive damages."

The fourth exception raises the point that the circuit judge erred in refusing or failing to instruct the jury as to what was the nature of the damages which they were en-



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titled to give, in the event they reached the conclusion that the plaintiff was entitled to a verdict, or, to state the point more precisely, in not instructing the jury what was the meaning of the following language used in section 2316 of the Revised Statutes, to wit: "And in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought." In the first place, it will be observed that there was no request that the circuit judge should explain to the jury what was the meaning of the language used in that quotation from the statute, or to define any of the terms used therein. He had laid before the jury the terms of the statute under which the action was brought, and had, as requested by plaintiff's eleventh request, instructed the jury in the language contained in the first quotation embraced in the fourth exception, which is taken substantially from the opinion of this court in *Petrie's Case* (29 S. C., at page 320, 7 S. E. 520), and had in another part of his charge instructed the jury that they could not give punitive or vindictive, but only compensatory, damages, proportionate to the injury resulting from the death of plaintiff's intestate to the parties for whose benefit the action was brought, and in still another portion of his charge had used the language found in the second quotation embraced in the fourth exception, which seems to form the basis of appellant's claim of error. Now, in view of the charge as thus stated, which, it seems to us, gave to the jury the law applicable to the case, if the appellant desired a more extended charge it was its duty to embody its proposition in the form of requests to charge. See *State v. Kendall*, 54 S. C., where, at page 195, page 301, 32 S. E., Mr. Justice Gary uses the following language: "The tenth exception imputes error to the circuit judge in not charging the proposition of law therein stated. His honor substantially charged the law applicable to the case, and, if the appellant desired the more extended charge, it was his duty to embody his propositions in the form of a request to charge. This exception is overruled." In this case the circuit judge having charged what law was, in his opinion, applicable to the case, and having given to the jury the construction which had been placed upon the statute by this court in the quotation from *Petrie's Case*, the appellant was bound, if a more extended charge was desired, to submit a request to charge, which was not done. For this reason the fourth exception must be overruled.

But there is another reason why this exception cannot be sustained, and that is that the exception contains no statement of the specific error or omission complained of. What particular instruction should have been given to the jury is not pointed out. The statement in the exception that the circuit judge erred in not declaring the law, as required by the manda-

Action for  
Wrongful Death  
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structions.

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tory terms of the constitution, which it is conceded does not mean all the law upon the subject under consideration, but the law applicable to the case made by the testimony (Norris v. Clinkscales, 47 S. C., at page 52, 25 S. E. 809), is clearly too general and insufficient, as it is not stated on what points the judge failed to declare the law, or what "limitations of the law" he omitted to explain.

But, even if we are permitted to resort to the argument for the purpose of ascertaining what were the points upon which it is alleged that the judge omitted to explain the law, we suppose that the error complained of was in the omission to instruct the jury that they are not allowed to take into consideration, in estimating the amount of damages, the wounded feelings of the person for whose benefit the action is brought, growing out of the death of their relative. But, as we have said, there was no request for any such instruction in this case, as there was in Petrie's Case, where the late Judge Norton was requested and did so charge the jury. But we do not understand that it was decided in that case that the wounded feeling of the beneficiaries at the loss of their relative could or could not be considered by the jury as one of the elements in making their estimate of the amount of damages; for, while Judge Norton did so charge the jury in that case, yet, as there was no exception to that portion of his charge, this court did not, and could not, properly consider whether there was any error in that portion of his charge. All that was really decided in that case, so far as this particular matter was concerned, was that the jury were not confined, in making their estimate of the amount of the damages, to the loss of any legal claim which the beneficiaries may have had upon their deceased relative; but, in the language of the statute, "the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom, and for whose benefit, such action shall be brought." This is manifest from the fact that the exception there considered made the point that as the children of the deceased for whose benefit the action was brought were all adults, and had been settled off to themselves several years before their mother was killed by the railroad train, they could not have any legal claim on the deceased for their support. As to this point, the supreme court used the following language: "It is contended, however, that, unless the children had some legal claim on the deceased for support, no damages could be recovered for their benefit. As the children of deceased were all adults, living to themselves, they could not possibly have any such claim. This view is based upon the idea that the injury spoken of in the statute means only the deprivation of a legal right. This, it seems to us, is a narrow view of the statute, and, on the contrary, its language repels any such view." And the court, after considering the terms of

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the statute, proceeds to say: "As it is quite certain that the beneficiaries of the action may sustain injury by the death of a relative, over and above the loss of any legal claim which they may have upon such relative, it follows that the view contended for cannot be sustained." It is quite clear, therefore, that all that was decided in the Petrie Case, so far as the particular matter now under consideration was concerned, was that the fact that the beneficiaries have no legal claim on their deceased relative does not deprive them of the right to recover damages in a case like this; and that it did not decide the question which, as we understand, the appellant desires to make by the fourth exception, to wit, whether, in a case like this, the jury are at liberty, in forming their estimate of the amount of damages, to take into consideration the wounded feelings of the beneficiaries resulting from the death of their relative. Nor, so far as we are informed, is there any case in this state which distinctly decides that question, though the very recent case of *Mason v. Railway Co.* (S. C.) 36 S. E. 440, does seem to imply that such an element may be taken into consideration by the jury in estimating the amount of damages; for in that case the person killed was an infant about 16 months old. But the decision was based upon the Petrie Case, and the case of *Strother v. Railroad Co.*, 47 S. C. 375, 25 S. E. 272, in which the question was whether the circuit judge had erred in refusing to instruct the jury "that the measure of damages in statutory actions for injuries causing death is compensation for the pecuniary loss to the survivors from the death of the deceased." Held, that there was no error, basing the decision upon the terms of the statute and the decisions in Petrie's Case and in Strother's Case.

The decisions elsewhere seem to be conflicting. In 8 Am. & Eng. Enc. Law (2d Ed.) at page 926, we find the following language, which is said to be an expression of the general rule: "Unless the statute expressly so provides, nothing can be allowed to the plaintiff, by way of damages, as a solatium, to compensate him for his wounded feelings, or for the mental anguish the death of his relative may have caused him, and proof of such mental suffering is not admissible on the question of damages." But in the very next paragraph "a modified doctrine," as it is termed, is stated as follows: "In some jurisdictions, however, where the legislature has provided that the jury shall assess such damages as they deem fair and just with reference to the injury resulting from the death, thus omitting to limit the damages to the 'pecuniary' injury, it is held that the jury may consider the loss of society caused from the death, and the comfort which a parent would have derived from rearing his child."

It seems to us that what is stated above as the "modified doctrine" is in much more conformity to the terms of our statute, and the trend of our decisions construing the statute,

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than the above-stated general rule. By the express terms of our statute, as we have seen, the jury are authorized to give "such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom, and for whose benefit, such action shall be brought"; and this court has construed the statute in *Petrie's Case* and in *Strother's Case*, recognized and followed in *Mason's Case*, *supra*, to mean, not merely the pecuniary injury which may be sustained by the loss of any legal claim which they may have had upon the deceased for their support or for the services of the deceased; and in the case of *Garrick v. Railroad Co.*, 53 S. C. 448, 31 S. E. 334, recognized and followed in the former decision in the present case, has held that the language of the statute necessarily implies that compensatory, and not punitive, damages may be awarded. So that when the circuit judge laid before the jury the terms of the statute, and instructed them how that statute had been construed by this court, he did all that was necessary; and there was no necessity for him to go further, and explain to the jury what was meant by the words "such damages"; for, in fact, those words are, practically, defined by the language of the statute itself, as construed by the cases just cited, to mean whatever damages the jury may think are a proper compensation to the parties for whose benefit the action is brought for the injury, whether arising from the pecuniary loss or otherwise, sustained by such parties by reason of the death of their relative. If it should be said, as has been argued in this case, that the view which we have adopted would leave the jury entirely untrammelled by any rule, and would permit them to indulge in "wild and extravagant" notions as to what is a proper compensation to the parties for the injury sustained, two answers can be made. In the first place, they are not, as we have seen, entirely untrammelled; for they cannot give vindictive damages, and are limited to such an amount as they may think will afford a proper compensation for the injury sustained by the parties for whose benefit the action is brought. And, in the second place, if the lawmaking power has seen fit to place no other limit upon the jury than what they may think proportioned to the injury sustained, we do not see by what authority this court can undertake to prescribe any additional limitation. It is no more than what is allowed in every action for a tort sounding damages. The only remedy provided by law against capricious, wild, or extravagant verdicts is by a motion addressed to the circuit court for a new trial upon the ground of excessive damages, and our books of report show that such remedy has, not unfrequently, been resorted to in just such cases as the present. The fourth exception must therefore be overruled.

The fifth and sixth exceptions, based, as they are, upon the passage from the charge which is quoted in the fifth exception,

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may be considered together. These exceptions are, practically, disposed of by what we have said in considering the fourth exception. But it may be proper to notice the particular matter complained of in these two exceptions, viz. whether it was error to refuse to charge the jury that a violation of the city ordinance therein referred to by the deceased would be such a violation of law as would defeat this action, because he had not been requested to do so. While it is true that the circuit judge was not requested to charge as there indicated, yet it is equally true that the circuit judge did charge defendant's thirteenth request, with certain words very properly added by the judge. That request reads as follows: "Section 609 of the Revised Ordinances makes it unlawful for any person, not employed by railroad company, to get on or off their cars or locomotives while the same are in motion,"—to which the judge added these words, "within the corporate limits of the city;" to which additional words no exception was or could be taken, as they are taken from the words of the ordinance. Now, as the jury were instructed that the statute provides that, if a person is injured by a collision with the engine or cars of a railroad company at a crossing, and it appears that the railroad company had neglected to give the signals prescribed by the statute, such railroad company shall be liable for all damages caused by the collision, unless it is shown that the person injured was, at the time, "acting in violation of the law, \* \* \* and that such \* \* \* unlawful act contributed to the injury"; and when, as we have seen, the jury were likewise instructed that the city ordinance made it unlawful for any person not employed by the railroad company to get on or off the cars or locomotives while the same were in motion, within the corporate limits of the city,—it seems to us that the circuit judge declared the law applicable to the case, and, if the appellant desired a more extended charge, a request to that effect was necessary. The fifth and sixth exceptions must also be overruled. The judgment of this court is that the judgment of the circuit court be affirmed.

Accident at  
Crossing—Failure  
to Give Signals—Contributory Negligence  
in Attempting to  
Board Moving  
Train in Violation  
of Ordinance—  
Instruction.

Kansas City, etc., Ry. Co. v. Board Waterworks

KANSAS CITY P. & G. RY. CO.

v.

BOARD OF WATERWORKS IMP. DIST. NO. 1.

(*Supreme Court of Arkansas, Oct. 27, 1900.*)

[59 S. W. 248.]

**Statutory Provisions—Evidence—Burden of Proof.**—Where sec. 5341, Sand. & H. Dig., provides for enforcing assessments against real property for improvements, and sec. 5342, that it shall not be necessary to exhibit any copy or other paper, connected with such assessment or collection of moneys assessed under such act, with the complaint, and sec. 5157, makes authorized printed copies evidence of such ordinance. *Held*, that the burden of showing that such ordinance for assessment and improvement was legally passed as published is not on the plaintiff, where authorized printed copies are in evidence.

**Same—Construction of Statute.**—Under sec. 5321, *et seq.*, which provides for making improvements of municipal corporations, by organizing improvement districts, which shall include the whole city or a portion named in the petition for improvement signed by ten property owners residing in such district, the whole city may be included in one district, for construction of a city waterworks.

**Railroad's Right of Way—Benefits Must Be Shown.\***—Although the right of way of a railroad company is situated in such an improvement district as provided by sec. 5321 of Sand. & H. Dig., still the right of way cannot be assessed for improvement, unless benefit to such right of way is shown by such improvement.

**Same—Enforcement of Lien.**—Under such statute, the right of way of a railroad company cannot be sold for the purpose of enforcing taxes for improvements.

Appeal by defendant from Benton county circuit court in chancery. Reversed.

Read & McDonough and Dodge & Johnson, for appellant.

E. P. Watson, W. V. Tomkins, and M. W. Greeson, for appellee.

Bunn, C. J. This is a bill to foreclose a lien on defendant's right of way extending through said improvement district, and the depot buildings and depot grounds situated therein, and to collect the amount of the district assessments made against said property. The answer puts in issue the passage of the ordinance organizing said district, and authorizing and making said assessment.

Case Stated.

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\*See notes at end of case.

## Kansas City, etc., Ry. Co. v. Board Waterworks

The defendant first contends that the plaintiff has the burden of proof to show that said ordinances were duly passed, and were published as the law directs. Section 5341, Sand. & H.

Statutory Pro-  
visions—Evi-  
dence—Burden  
of Proof.

Dig., reads thus: "The board (on refusal of any property owner to pay his assessment) shall straightway cause a complaint in equity to be filed in the court having jurisdiction of suits for the enforcement of liens upon real property, for the condemnation and sale of such delinquent property, for payment of said assessment, penalty and costs of suits, in which complaint it shall not be necessary to state more than the fact of the assessment and the non-payment thereof within the time required by law, without any further statement or any steps required to be taken by the council, or board or any other officer whatever, concluding with a prayer that the delinquent property be charged with the amount of such assessment, penalty and costs, and be condemned and sold for the payment thereof." Section 5342: "It shall not be necessary to exhibit with the complaint any copy of any ordinance or other document or paper connected with the assessment and collection of the moneys assessed under this act." Then follow the provisions for the enforcement of the assessments, all showing the intention of the legislature to make the procedure the simplest and most expeditious consistent with the rights of the parties involved, and it is manifest that its intention was to make the few allegations of the complaint a prima facie case; that is, if not controverted in the pleading and by proof, to be sufficient to authorize the decree of condemnation and foreclosure. But the defendant contends that the proceeding is under section 5336 of the Digest, and not under the general statute, as expressed in section 5155 and 5157. Section 5336 has no reference to proof of publication, nor upon which party is the burden to show that the ordinance has been duly published. It only defines the duty of the clerk and of the one aggrieved by the assessment. Section 5157 provides for the recording and publication of all by-laws and ordinances of the council imposing any fine, forfeiture, or penalty, and makes no exception. It is a general ordinance on the subject. Section 5155 reads: "The printed copies of the by-laws and ordinances of any municipal corporation, published under its authority, and transcripts of any by-law, ordinance or of any act of any municipal corporation, recorded in any book or entered on any minutes or journal, kept under the direction of such municipal corporation, and certified by the clerk, shall be received in evidence for any purpose for which the original ordinances, books, minutes or journal would be received (and) with as much effect." In construing these sections this court, in *Van Buren v. Wells*, 53 Ark. 377, 14 S. W. 40, after discussing other questions in the case, said: "The only remaining question is, was the burden on plaintiff to prove that the ordinances were published in the manner prescribed by the stat-

## Kansas City, etc., Ry. Co. v. Board Waterworks

ute? We think not. The statute makes printed copies of the ordinances of any city or incorporated town, published by the authority of such city or town (and duly-certified copies are in evidence in this case), and manuscript copies of the same, copied by the proper officer, and having the seal of the city or town attached, evidence of the existence of the ordinances and their contents, and makes a failure to publish a sufficient defense to any suit or prosecution for the fines or penalties imposed by the ordinances." These sections furnish the rule in this case, and the question of burden of proof is settled in the case cited, and rests upon the defendant.

The next contention of defendant is that the city of Siloam

**Same—Construction of Statute.**

Springs and its officers were without power or authority of law to assess its said property for

the purpose of local improvements, or to pass the ordinance attempting to create said improvement district, and that they were without power or authority to make said improvements or levy said taxes against this defendant railroad company, chartered and organized for that purpose. This particular objection is not specifically made in the answer, and seems to involve two propositions: First, the power of the city to organize an improvement district including all its territory; and, secondly, whether or not the right of way of a railroad is the subject of an assessment for local improvements. The first of this proposition has been answered by the opinion of this court in *Crane v. City of Siloam Springs*, 67 Ark. 34, 55 S. W. 955. As to whether or not the right of way of a railroad extended through or into an improvement district

**Railroad's Right of Way—Benefits Must Be Shown.**

was intended by the lawmakers to be subject to these assessments is a question not altogether free from doubt, owing to the peculiar right a railroad has in the property, and the peculiar use to which it is exclusively devoted. As to the manner of assessing rights of way, and incidentally as to the propriety of including rights of way in the list of property to be assessed, see *Weltz, Assessm.* § 142, and extensive notes thereunder. The statute (and so does the constitution) makes all real estate the subject of these assessments, and another statute makes all real estate subject to general tax to be also real estate subject to these assessments; and the general revenue laws of the state makes right of way, depot grounds, and so forth, real estate, and to be assessed as such. Prima facie, then, this class of property is subject to assessment; but, since all burdens of the kind are imposed only on the theory that the improvements for which they are laid are of corresponding benefit to the property itself, if it can be shown that no benefit can accrue, then the property is not subject. But as the assessment itself, by proper authority, is prima facie valid, it necessarily devolves on one desiring relief from the burden to show that no benefits will accrue. This leads us to an understanding of the statement of Elliott, where he says in his work on rail-



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roads: "It has been held that, if the property against which an assessment has been levied has not been benefited (or may not be) by the improvement, the collection of the assessment may be enjoined; but this doctrine is to be taken with careful qualification, for it is only in very clear cases that courts can interfere." Such, also, is the theory of all the decisions we have been able to find on the subject. Even those which denied that a right of way is in general subject to local assessment, all in one way and another, and to one extent and another, qualify the doctrine maintained by them by saying or indicating, at least, that when improvements do not benefit the property that fact is the real defense. *Detroit, G. H. & M. Ry. Co. v. City of Grand Rapids* (Mich.) 63 N. W. 1007, 28 L. R. A. 793, and citations in the dissenting opinion; *In re Commissioners of Public Parks*, 47 Hun, 302; *Chicago, M. St. T. P. Ry. Co. v. City of Milwaukee*, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249. And these are the strongest cases we are able to cite just now. In the case at bar it would be assuming too much for us to say that the property assessed is not or will not be benefited, naturally, by the improvements made, in the absence of a stronger showing to that effect.

The procedure to assess and appraise the property seems to have been in substantial compliance with the statute. Under our revenue laws, railroad rights of way are valued as units, or by the entire lines, by the state board appointed for that purpose; and these appraisements are certified to the county assessors, through the auditor of state and county clerk, and he is required to make his assessment upon such valuation, and certify the same back on the record from which local assessments are made.

The decree, so far, is affirmed. But there is no authority to sell a section of the right of way of a railroad, although a lien is declared thereon for the assessment. Elliott says (section 791) that it is the general rule that, where the statute specially provides a remedy of the enforcement of the assessment, that remedy must be pursued, but if a right be given,

and no remedy prescribed, the courts will usually provide the appropriate remedy. Whether we term this assessment a debt against the railroad in personam, or only in rem against the particular property, it can only be collected against the railroad as a unit; that is, against the whole road within the state. In ordering otherwise, the chancellor was in error. The cause is therefore reversed and remanded, to proceed against the railroad company, as such, to enforce the assessment in equity.

Same-Enforcement of Lien.

## NOTES.

#### LIABILITY OF RAILROAD RIGHT OF WAY AND ROADBED TO ASSESSMENT FOR LOCAL IMPROVEMENTS.

As to whether a railroad company's right of way, its roadbed and tracks can be specially assessed for the cost of local improvements, the authorities do not seem to be in harmony.

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**Must Be Specially Benefited.**—All of the authorities agree that the right of way, roadbed or tracks of a railroad company cannot be specially assessed for the cost of a local improvement, unless specially benefited by the improvement. *Mount Pleasant v. Baltimore & O. R. Co.*, 11 L. R. A. 520, 138 Pa. 365; *Pittsburgh's Petition*, 138 Pa. 424; *Junction R. Co. v. Philadelphia*, 88 Pa. 424; *Philadelphia v. Philadelphia, W. & B. R. Co.*, 33 Pa. 41; *Re Public Parks Com'rs*, 47 Hun (N. Y.) 302; *State v. Newark*, 27 N. J. L. 185; *Bloomington v. Chicago & A. R. Co.*, 134 Ill. 451; *New York & H. R. Co. v. Morrisania Trustees*, 7 Hun (N. Y.) 652; *State v. Elizabeth*, 37 N. J. L. 330; *Farmers' Loan & T. Co. v. Ansonia*, 61 Conn. 76.

And in *New York & N. H. R. Co. v. New Haven*, 42 Conn. 279, 19 Am. Rep. 534, it was held that the benefit to the railroad from the local improvement must be, in order to render the railroad assessable, of such nature as to benefit the property for the public purposes for which it is used at the time; and that the fact that improvement (a pavement) made access to the railroad station more easy showed a benefit to the public at large, but not a special benefit to the railroad company.

**HELD LIABLE TO ASSESSMENT.**

**Roadbed.**—The roadbed of a railroad company may be assessed for local improvements. *Peru, etc., R. Co. v. Hanna*, 68 Ind. 562; *New York, etc., R. Co. v. Dunkirk*, 65 Hun (N. Y.) 404; *State v. Elizabeth*, 37 N. J. L. 330; *State v. Jersey City*, 42 N. J. L. 97; *Northern Ind. R. Co. v. Connelley*, 10 Ohio St. 164; *State v. Passaic*, 54 N. J. L. 340; *Kuehner v. Freeport*, 143 Ill. 92.

And in *New Jersey*, it is held that the roadbed of a railroad company, whether or not it is owned in fee, is assessable for local improvements. *State v. Passaic*, 54 N. J. L. 340; *State v. Jersey City*, 42 N. J. L. 97; *State v. Elizabeth*, 37 N. J. L. 330.

**Right of Way—Sewer in Same Street.**—In *Troy, etc., R. R. Co. v. Kane*, 9 Hun 406, the tracks of a railroad company laid upon a street were held liable to assessment for the construction of a sewer in the same street, and in answer to the argument that the company derived no positive advantage from the improvement, the court said: "Whether it was benefited by it, and to what extent compared with the surrounding or adjacent property, were subjects of consideration devolving upon the officers designated by law to determine those questions."

**Same—Sewer in Adjoining Street.**—A railroad company's land used only for its right of way may be specially taxed for the cost of a sewer in an adjoining street. *Chicago & A. R. Co. v. City of Joliet*, 153 Ill. 649, 39 N. E. Rep. 1077. In this case the court said in its opinion: "It has been recently held by this court that in a special assessment proceeding, where land is restricted by statute to a particular use, and cannot be applied to any other, the true measure of benefit which an improvement will confer on the land is its increased value for the special use to which it may by statute be restricted. *Illinois Cent. R. Co. v. City of Chicago*, 141 Ill. 509, 30 N. E. 1036. There is no reason why the same rule should not apply to a proceeding by special taxation, as well as to a special assessment proceeding. If it be true, as is contended by counsel, that the land of appellant is here permanently devoted to a particular use,

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it may yet be true that it will receive a benefit from the improvement for the use to which it is so applied. It does not appear that the common council of the city, in determining that the land would be benefited, reached that conclusion upon the supposition that it would be benefited for all the uses to which such land might be adapted, independently of its restriction to a particular use. If it was benefited for the purposes of the particular and restricted use thus indicated, the special tax could be levied upon it to the extent of such benefit. Where a railway is contiguous to a proposed street improvement, it falls within the designation of property that may be specially taxed for the making of the local improvement. *Jacksonville Ry. Co. v. City of Jacksonville*, 114 Ill. 562, 2 N. E. 478; *Chicago & N. W. Ry. Co. v. People*, 120 Ill. 104, 11 N. E. 418; *Kuehner v. City of Freeport*, 143 Ill. 92, 32 N. E. 372; *Illinois Cent. R. Co. v. City of Decatur*, 126 Ill. 92, 18 N. E. 315; *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 67; *Illinois Cent. R. Co. v. City of Mattoon*, 141 Ill. 32, 30 N. E. 773."

**Same—Assessment of Railroad for Drainage Benefits.**—The Illinois Drainage Law, (act of 1885, sec. 40), which provides for assessing the right of way and tracks of railway companies within a drainage district for benefits thereto by the proposed drainage, is not void, or subject to any constitutional objection. This law does not authorize the commissioners, in making assessments, to deal with or take into consideration expenditures at all. It only gives them power to assess public roads and railroads such sum or sums as will be just and equitable for them to pay in proportion to the benefits received and prescribes the manner in which that shall be done, *viz.*, by estimating the amount of benefits to the entire district, including the benefits to such public roads or railroads, and also the benefits to them, and then giving the ratio or proportionate part of the taxes of the district to be paid by such roads. The statute does not authorize property to be assessed beyond benefits. *Illinois Central R. Co. v. Commissioners of East Lake Special Drainage District*, 129 Ill. 417.

**Same—Crossing Improvement.**—In *Illinois Cent. R. Co. v. Mattoon*, 141 Ill. 32, it was held that a railroad right of way may be assessed on both sides of a street for the cost of improving the crossing where it intersects the street.

**Same—Prior Street Improvement.**—Land appropriated by a company for its track through a city, and crossing an improved street at right angles, and upon which the track was constructed after the work of improvement had been completed, is liable to assessment for the cost of such work, the land so appropriated and occupied exclusively for that purpose being land within the meaning of section 116 of the act for the organization of cities. (Swan's Ohio Rev. St. 985.) *Northern Ind. R. Co. v. Connelly*, 10 Ohio St. 159.

**Same—Assessment for Construction of Turnpike.**—Where a railroad track runs through a taxing district created under the "one-mile assessment pike law," (title 7, chap. 7, Rev. St.), it is subject to taxation in such district, in the proportion that the mileage of its track therein bears to its whole track, according to the rules prescribed by sections 2770 to 2776, inclusive, Rev. St., for taxing railroads in this state. The provisions of the one-mile assessment pike law, together with the statutes

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that prescribe the duties of county auditors in this state, afford sufficient means for such officers to ascertain what personal property, and what property of a railroad company, is properly taxable in a taxing district created pursuant to the law. *New York, L. E. & W. R. Co. v. Commissioners of Marion County* (Ohio, March 31, 1891), 27 N. E. Rep. 548.

**Same—Held to Be Abutting Property.**—The track of a railroad company, running parallel with a street is liable to be assessed for street improvements as property abutting on the street. *Penn. & Ind. R. R. Co. v. Hanna*, 68 Ind. 562.

**HELD NOT LIABLE TO ASSESSMENT.**

**Roadbed.**—While, as a general rule, the property owner cannot defend upon the ground that his property is not benefited by a street improvement, this rule has no application to the roadbed of a railroad company, that being the one species of property which the law presumes incapable of being benefited. *Allegheny City v. Western Pa. R. Co.*, 138 Pa. St. 375, 21 Atl. Rep. 763.

**Street Improvements.**—Street improvements cannot benefit railroad tracks and the right of way, so as to render them assessable for the cost of the improvement. *Chicago, M. & St. P. R. Co. v. Milwaukee* (Wis.), 12 L. R. A. 249.

**Right of Way Held Not to Be Abutting Property.**—A statute authorizing assessments upon abutting property for street improvements does not apply to a railroad right of way and track which crosses a street. Such right of way and track are not abutting property. *Chicago, B. & Q. R. Co. v. South Park Com'rs*, 11 Ill. App. 562; *South Park Com'rs v. Chicago, etc., R. Co.*, 107 Ill. 105, 114 N. Y. 439.

Where a street crosses a railway laid in a deep cutting by means of a bridge supported on stone piers erected on the slope of the cutting, the track and the slopes do not bound or abut upon the street within the meaning of the Metropolis Management Amendment Act, 1862, § 77, so as to require the company to contribute to the paving of the road. *London, B. & S. C. R. Co. v. St. Giles, Camberwell, L. R.*, 4 Ex. D. 239, 48 L. J. M. C. 186.

A company which carries a highway over its tracks by means of a bridge having parapets consisting of two walls resting upon arches having their foundations in the railway company's land is not the "owner of land bounding or abutting on" the highway within section 77 of the Metropolis Management Act of 1862, and is not liable as owner of the walls to contribute to the expense of paving the street. *Great Eastern R. Co. v. Hackney Dist. Board of Works*, 13 Am. & Eng. R. Cas. 404, L. R., 8 App. Cas. 687, 52 L. J. M. C. 105, 49 L. T. 509, 31 W. R. 769, reversing L. R., 9 Q. B. D. 412, 51 L. J. M. C. 57, 46 L. T. 679, 30 W. R. 765.

**Street Paving.**—In *City of Philadelphia v. Phila., Wilm. & Balt. R. R. Co.*, 33 Pa. St. 41, the endeavor was to enforce against a railway company a claim for paving part of a street adjacent to which the road of the company defendant ran. The court, however, decided that the property was not liable to assessment, saying: "The claim has no foundation either in the letter of the law or in its spirit.... Not in the spirit, because the paving laws are means of a compulsory contribu-

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tion among the common shares in a common benefit, and as a railroad cannot, from its very nature, derive any benefit from the paving, while all the rest of the neighborhood may, we cannot presume that the compulsion was intended to apply to them."

It appeared in this case that the railway company owned only a right of way over the land which it was sought to assess, and hence, in a latter case, a distinction was sought to be drawn between it and those cases where the company held the land in fee. This attempted distinction was, however, pronounced by the court to be groundless, in *Junction Railroad Co. v. City of Philadelphia*, 88 Penn. St. 424.

A municipality cannot support a claim for paving against the roadbed of a railroad, and it is immaterial whether the company has simply the right of way or owns the bed in fee. The right of way acquired by a company is exclusive at all times and for all purposes. *Junction R. Co. v. Philadelphia*, 88 Pa. St. 424; *Philadelphia v. Philadelphia, W. & B. R. Co.*, 33 Pa. St. 41; *Mt. Pleasant v. Baltimore & O. R. Co.*, 138 Pa. St. 365; *Allegheny City v. Western Pa. R. Co.*, 138 Pa. St. 375.

**Paving Sidewalk.**—A municipal claim for the paving of a sidewalk along the roadbed of a company cannot be sustained, inasmuch as the paving cannot possibly confer a special benefit upon the property known as the right of way, and hence the whole theory which justifies such charge fails in this instance. *Mt. Pleasant v. Baltimore & O. R. Co.*, 138 Pa. St. 365, 20 Atl. Rep. 1052; *Philadelphia v. Philadelphia, W. & B. R. Co.*, 33 Pa. St. 41; *Junction R. Co. v. Philadelphia*, 88 Pa. St. 424; *Allegheny City v. Western Pa. R. Co.*, 138 Pa. St. 375, 21 Atl. Rep. 763; *Philadelphia v. Philadelphia, W. & B. R. Co.*, 2 Phila. (Pa.) 244.

**Widening Street.**—The widening of the street along which there is a railroad right of way cannot benefit the railroad so as to warrant the assessment of the right of way for the cost of the improvement. *State v. Newark*, 27 N. J. L. 185.

A local improvement consisting in the widening of the street where it passes under a railroad track is not such a benefit to the railroad right of way as to render it assessable for the cost of the improvement. *City of Bloomington v. Chicago & A. R. Co.*, 134 Ill. 451, 26 N. E. Rep. 366.

**Opening Street across Track.**—Property which cannot be used except for the specific purpose of a railroad cannot be benefited by opening a street across it. *New York & H. R. Co. v. Morrisania*, 7 Hun (N. Y.) 652.

The opening and paving of a street across a railroad cannot benefit it, so as to render it assessable for such improvement. *Detroit, G. H. & M. R. Co. v. Grand Rapids (Mich.)*, 28 L. R. A. 793.

**Opening of Adjacent Street.**—In *New York and Harlem R. R. Co. v. Board of Trustees, etc.*, (N. Y.), 14 Sup. Ct. 652, it was held that the railway company was not assessable for benefits conferred by the opening and improvement of an adjacent street.

**Opening Street across Track—Power to Sell Roadbed.**—A municipality has no power to sell the entire roadbed of a railroad company, nor any lands necessarily used by it for the purposes of its franchise, under an assessment for opening a street across the track. *New York & H. R. Co. v. Morrisania*, 7 Hun (N. Y.) 662.

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**Mere License to Run Trains.**—A railroad company having a mere license to run trains over the tracks of another company, cannot be assessed on account of it for a local improvement. *Louisville, etc., R. Co. v. East St. Louis*, 134 Ill. 656.

**Special Assessment on Railroad Property—When Not Considered an Assessment of Right of Way.**—A special assessment on two separate portions of a block owned by a railroad company and through which its right of way runs, is not invalid as an assessment upon the right of way, although it is so modified by the court as to spread the aggregate of the two assessments over the whole block. *Chicago, R. I. & P. R. Co. v. Chicago* (Ill., June 15, 1891), 27 N. E. Rep. 926.

**LIABILITY OF STREET RAILWAYS TO LOCAL ASSESSMENTS.**

In the absence of a charter or other exemption, a street railway in a public street is liable to local assessments where it is specially benefited by improvements. *Birmingham v. Klein*, 89 Ala. 461; *Appeal of North Beach & Mission R. R. Co.*, 32 Cal. 499; *New Haven v. Fair Haven & W. R. Co.*, 38 Conn. 422; *Kuehner v. Freeport* (Ill.), 17 L. R. A. 774; *Chicago v. Baer*, 41 Ill. 306; *Troy & Lansingburg R. Co. v. Kane*, 9 Hun (N. Y.) 506.

**Paving Street.**—The paving of the street in which a street railway is laid has been held to be such a benefit as to render the railway liable to a local assessment. *New Haven v. Fair Haven & W. R. Co.*, 38 Conn. 422, 3 Am. Ry. Rep. 230; *Chicago v. Baer*, 41 Ill. 306.

But where a street-railway company is required to pave that portion of the street used as its roadbed, it is not liable to local assessments for improving the rest of the street. *Chicago, etc., R. Co. v. Chicago* (Ill.), 27 N. E. Rep. 926; *Chicago v. Sheldon*, 9 Wall. (U. S.) 50.

**Widening Street.**—The widening of the street in which a street railway is laid is a benefit rendering the railway liable to a local assessment. *Paramelee v. Chicago*, 60 Ill. 267; *Chicago City R. Co. v. Chicago*, 90 Ill. 573.

The franchise, right of occupancy, and right of way of a street railway are liable to local assessments, if benefited by the widening of the street in which the track is laid. *Chicago City R. Co. v. Chicago*, 90 Ill. 573.

**Whether Tracks Real Estate.**—The track of a street railway, when laid in the usual manner, is real estate, and liable to an assessment for the cost of paving the street. *New Haven v. Fair Haven & W. R. Co.*, 38 Conn. 422, 3 Am. Ry. Rep. 230.

But the track of a street railway in a public street is not real estate within the meaning of section 3, tit. 1, subc. 7, of the charter of St. Paul, authorizing the levy of local assessments upon real estate. *State v. Ramsey County Dist. Ct.*, 31 Minn. 354, 13 Am. & Eng. R. Cas. 419. The ground for this holding, however, was the peculiar language of the charter.

**Land Bordering on Street.**—In *O'Reilley v. City of Kingston*, 114 N. Y. 439, it was held that lands "bordering on or touching" a street, within the meaning of a charter authorizing assessments for street improvements, do not include land occupied in the street by a street-railroad company.

## Galveston, etc., Ry. Co. v. Adams

**Must Be Benefited.**—But street railways cannot be assessed for street improvements unless they are in fact benefited by the improvements. *Farmers' Loan & Trust Co. v. Borough of Ansonia* (Conn.), 23 Atl. Rep. 705; *People ex rel. James v. Gilon*, 126 N. Y. 640.

And it has been held that the company's roadbed must be a benefit, benefits to its franchise not being considered. *Davis v. Newark*, 54 N. J. L. 144.

**Where Not Considered Benefited.**—A company had a double track in a street, and neither the spaces between the rails nor the spaces between the tracks were paved nor contracted to be. *Held*, that the board of public works might fairly be of the opinion that the company was not benefited by the paving of the rest of the street, and therefore might properly refrain from assessing the company towards the expense thereof. *State ex rel. v. Ramsey County Dist. Ct.*, 32 Minn. 181, 19 N. W. Rep. 732.

**Contract Exempting Railway.**—A contract with the city exempting a street railway from all assessments for local improvements, on condition that the company keeps the streets through which its tracks are laid in good order, is valid. *Chicago v. Sheldon*, 9 Wall. (U. S.) 50.

**New Pavements.**—It has been held that a street-railway company cannot be assessed for the cost of laying new pavements, as they, like the making of the street itself, are permanent improvements, the cost of which must be borne by the city. *Montreal v. Montreal St. R. Co.* (Ca.), 3 Montr. Super. 320.

**Validity of Assessment on Abutting Owner as Affected by Failure to Assess Street-Railway Company.**—See *City of Shreveport v. Prescott* (La.), 2 Mun. Corp. Cas. 370, and *note*, 409 *et seq.*

## GALVESTON, H. &amp; S. A. RY. CO.

v.

ADAMS.

*(Supreme Court of Texas, Oct. 22, 1900.)*

[58 S. W. 831.]

**Harmless Error.**—In an action for injuries to its conductor, the defendant railroad could not have been prejudiced by the paragraphs of the charge on the subject of its liability as affected by the negligence of the employees of another company, whom he called to his aid when his train was stalled, as such paragraph left the jury at liberty to determine whether or not there was such negligence, and it appeared that there was no evidence of such negligence.

**Injury to Employee—Whether Violation of Rules Negligence Per Se.\***—A railroad employee is not guilty of negligence *per se* in violating a rule prescribed by the railroad company for his regulation in discharging his duties, and therefore the fact that personal injuries sustained by him were contributed to by an act of his in violation of such a rule, will not necessarily bar recovery for such injuries.

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\*See notes at end of case.

Error to court of civil appeals of Fourth supreme judicial district.

Action by T. T. Adams against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment of the court of civil appeals (55 S. W. 803) affirming a judgment in favor of plaintiff, defendant brings error. Affirmed.

Baker, Botts, Baker & Lovett and A. L. Jackson, for plaintiff in error.

A. C. Allen, Edgar Watkins, and Frank C. Jones, for defendant in error.

Brown, J. On the 25th day of March, 1898, T. T. Adams was in the employ of the Galveston, Harrisburg & San Antonio Railway Company as conductor on one of its freight trains, and received injuries under the circumstances  
**Case Stated.** hereafter stated. The train on which he was employed arrived at Houston, and, having entered the yards, stalled on a grade. The train was standing upon a curve, and persons engaged at either end could not see those engaged at the other end of it. The foreman of a switch crew employed in the yard by the plaintiff in error attached a switch engine to the front of the engine of that train to aid it in getting over the grade. It was proved, and, so far as we have been able to see, is undisputed, that it was the custom in that yard for a switch crew to go to the aid of a train under similar circumstances, and by attaching the switch engine to the locomotive, or to the rear of the train, as circumstances required, to assist it into the yards. It was also proved that it was the custom of conductors upon that railroad, under similar circumstances, to call upon the engineer of another train, if convenient, to aid the stalled train in passing the grade. The evidence upon this point cannot be said to be undisputed, but it was sufficient to justify a finding of the jury in favor of such authority and custom. A freight train belonging to the San Antonio & Aransas Pass Railway Company was upon the same track, behind the train on which Adams was conductor, using that track by agreement between the companies. The latter train could not proceed until Adams' train had passed over the grade. Adams, not knowing that the switch engine was attached to the front of his train, called upon the engineer of the train behind him to couple to the rear of his caboose, and to aid him by pushing his train up the grade. The coupling was made, the signal given, and both engines seemed to move at the same time, causing the train to move forward for several car lengths, when suddenly the train on which Adams was came to a halt, which caused the engine behind the caboose to run into and to break the platform of the caboose off. Adams was at the time upon the platform of the caboose,



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trying to draw the pin by which the following engine was coupled to his caboose; and when the platform was broken his leg was caught between the engine and the caboose, and so injured as to make amputation necessary. The timbers of the platform were decayed, which caused it to break in the collision. The sudden stopping of the train of which Adams was conductor was caused by the engineer applying the emergency air brake, which was forbidden by the rules of the company, except "to prevent a wreck or derailment or to save life or property." There is no evidence that a wreck or derailment was impending, or that life or property was endangered. It was claimed by the defendant below, and is urged here by assignment, that Adams had no authority over the train at the time and place when he received his injury, but that the same was, by the rules of the company, in charge of the yard master; but upon this issue the evidence was conflicting, and sufficient to have sustained a verdict either way. The case was tried before a jury, and judgment rendered for the plaintiff, Adams, for \$15,000, which was affirmed by the court of civil appeals.

The writ of error was granted in this case upon the assignment based on the following charge: "You are charged in this connection, however, that if you find that there was negligence on the part of those operating the San Antonio & Aransas Pass Railway Company's train, but that the injury, if any, was the joint result of such negligence on the part of those operating the San Antonio & Aransas Pass train, and of such negligence, if any, of the engineer or fireman of the defendant as, under the fifth paragraph of this charge, would authorize a recovery, or was the joint result of negligence on the part of the San Antonio & Aransas Pass Railway Company, or those operating its train, and of such defects of the platform or caboose, if any, as you have been instructed would, under the second paragraph of this charge, authorize a recovery, then, should you so find, you are instructed that in such an event the fact that negligence on the part of the San Antonio & Aransas Pass Railway Company or its employees co-operated in causing the injury would not be a defense to the defendant." We were of the opinion that the plaintiff should be held responsible for the negligence, if any, of the persons he called to his aid, if such negligence contributed to the injury that he received. We do not intend to intimate an opinion as to what would be the rule in such case, for, upon a careful examination of the facts, we find no evidence of any negligence on the part of the servants of the San Antonio & Aransas Pass Railway Company. There being no negligence by those servants, the charge could not operate to the injury of the defendant.

The plaintiff in error presents, in different forms, the proposition that a servant who, in discharging his duties, disobeys

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the regulations of his master, is guilty of negligence per se, and if injured, and the act which violates such rules contributes to the injury, no recovery can be had. This rule would give to regulations of the master the force of statutory enactments. We do not understand the law to be consistent with that contention. If a violation of a rule shows conclusively that the servant cannot recover under the facts of the case, the question of contributory negligence becomes a question of law to be decided by the court. If, however, under the facts of the particular case, there might be a phase in which the servant would be justified or excused in disregarding the rule of the company, then it becomes a question for the jury to determine whether such act is negligence; that is, whether, under all the circumstances, a reasonably prudent person would have done as the plaintiff in the case did. *Dunlap v. Railroad Co.*, 130 U. S. 649, 9 Sup. Ct. 647, 32 L. Ed. 1058; *Railway Co. v. Sweeney* (Tex. Civ. App.) 36 S. W. 800; *Bonner v. Bean*, 80 Tex. 155, 15 S. W. 798. The general rule of law is that contributory negligence is a question of fact to be found by the jury, and the facts of this case do not take it out of that rule.

We do not think it necessary to discuss the different assignments embraced in the application for the writ of error. We find no error in the judgment, and it will be affirmed.

## NOTES.

**Injury to Servants—Right to Disregard Rules of Company.**—"It is well settled that a violation of the rules of a company by an employee thereof, will defeat a recovery for such injury. The exception to this is where the company itself has sanctioned the custom of their employees to act in violation of the rules, and has thus virtually abrogated them. This exception is based upon the theory that it would be unjust in employers to establish rules, sanction their violation, and then interpose such violation as a defense." *Fluhrer v. Lake Shore & M. S. Ry. Co.* (Mich.), 18 Am. & Eng. R. Cas., N. S., 153. See also, *notes*, 17 Am. & Eng. R. Cas., N. S., 430 *et seq.*

**Same—Same—Waiver of Rules by Company.**—Ordinarily, disobedience of a rule would be negligence; but if the defendant prosecuted the work in a manner that rendered the violation of the rule necessary or probable, or if it suffered and approved its habitual disregard, the rule was inoperative, as such disregard constitutes a waiver of the rule. *Hayes v. Manufacturing Co.*, 41 Hun (N. Y.) 407; *Fish v. Railroad Co.* (Iowa), 65 N. W. Rep. 995; *Railroad Co. v. Springsteen*, 41 Kan. 724; *Alexander v. Railroad Co.*, 83 Ky. 589; *Barrey v. Railway Co.*, 98 Mo. 62; *Sprong v. Railroad Co.*, 58 N. Y. 56; *Schaub v. Railroad Co.* (Mo.), 16 S. W. Rep. 924; *Wright v. Southern Pac. Ry. Co.* (Utah), 5 Am. & Eng. R. Cas., N. S., 559; *Smith v. Railroad Co.*, 18 Fed. Rep. 304. See also, *Louisville & N. R. Co. v. Bowcock*, 17 Am. & Eng. R. Cas., N. S., 421, and *note*, 430; *Kansas City, Ft. S. & G. R. Co. v. Kier*, 41 Kan. 661, 671, 38 Am. & Eng. R. Cas. 119.

## Notes

**Same—Same—Waiver by Conductor.**—Where a conductor orders a brakeman to couple cars in a manner which is forbidden by the rules of the company and the brakeman is injured, the rule is held to be waived by the company as the conductor is its representative. *Railroad Co. v. De Bray*, 71 Ga. 406; *Railroad Co. v. Brooks*, 83 Ky. 129; *Louisville, etc., R. Co. v. Foley*, 99 Ky. 220; *Hannah v. Connecticut River Ry. Co.*, 154 Mass. 529; *Mason v. Richmond, etc., R. Co.*, 111 N. Car. 412, 53 Am. & Eng. R. Cas. 183, 16 S. E. Rep. 698; *Boatwright v. Railroad Co. (S. Car.)*, 25 S. E. Rep. 129; *Coleman v. Railroad Co. (S. Car.)*, 25 S. E. Rep. 446; *Chicago M. & St. P. Ry. Co. v. Ross*, 112 U. S. 377. But see, *Russell v. Richmond, etc., R. Co. (N. Car.)*, 47 Fed. Rep. 204; *Richmond, etc., R. Co. v. Finley*, 63 Fed. Rep. 228.

**Same—Same—Rule Abrogated by Custom.**—Where a brakeman, in violation of a rule of the company, was killed while riding in the cab of a locomotive, evidence was admitted to show that the company had knowledge of a custom of the brakeman to violate the rule. It was held that a violation of the rule was not a breach of duty and not negligence on the part of the brakeman and the company was liable for his death. *Sprong v. Boston, etc., R. Co.*, 60 Barb. (N. Y.) 30; *O'Neil v. Keokuk, etc., R. Co.*, 45 Iowa 546; *Flike v. Boston, etc., R. Co.*, 53 N. Y. 549; *Gordy v. New York, P. & N. R. Co. (Md.)*, 23 Atl. Rep. 607; *Union Pac. Ry. Co. v. Springsteen (Kan.)*, 21 Pac. Rep. 774; *Kan. City F. S. & G. R. Co. v. Kier (Kan.)*, 38 Am. & Eng. R. Cas. 119.

**Same—Same—Obedience to Orders Inconsistent with Rules.**—Where compliance with a rule becomes impossible by other orders that are inconsistent with the orders first given, an employee injured in consequence of violation of the rule cannot be held guilty of contributory negligence. *Hall v. Chicago, B. & N. R. Co. (Minn.)*, 49 N. W. Rep. 239; *Richmond & D. R. Co. v. Rudd*, 88 Va. 648.

It is the duty of an engineer to obey rules prescribed by his employer, unless they are abrogated by the employer, or obedience is made impossible by the master's act by his giving orders inconsistent with the general rules. *Pennsylvania Company v. Roney*, 89 Ind. 453; *Illinois Cent. Ry. Co. v. Neer*, 26 Ill. App. 356, 31 Ill. App. 126; *Hall v. Chicago, B. & N. R. Co.*, 46 Minn. 439; *Cincinnati, I., St. L. & C. R. Co. v. Lang*, 118 Ind. 519; *Hannibal & St. J. R. Co. v. Kanaley*, 39 Kan. 1.

**Same—Same—Where Rule Is Impracticable.**—If sticks, provided by a railroad company for uncoupling cars, are too short to use unless the brakeman goes in between the cars, a rule of the company, prohibiting employees from going between cars to effect a coupling, will be of no effect, if one is injured in attempting to couple cars, and he will not be held guilty of contributory negligence. *Memphis & C. R. Co. v. Graham*, 94 Ala. 545; *Renninger v. New York Cent. R. Co.*, 11 N. Y. App. Div. 565; *Brown v. Louisville, etc., R. Co.*, 111 Ala. 275.

**Same—Same—Rules Must Be Known to Employees.**—The rules of a corporation are the laws which govern them and their employees and officers, but no employee is bound by any rule which has not been promulgated to him, or to which his attention has not been called. *Port Royal & W. C. Ry. Co. v. Davis (Ga.)*, 22 S. E. Rep. 833; *Georgia Pac. R. Co. v. Davis (Ala.)*, 9 So. Rep. 252; *Mackey v. Baltimore & P. R. Co.*, 8 Mackey (D. C.) 282; *Louisville, Evansville & St. L. Ry. Co. v.*

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Utz (Ind.), 32 N. E. Rep. 881; Chicago, St. L. & P. R. Co. v. Fry (Ind.), 28 N. E. Rep. 989; Atchison T. & S. F. Ry. Co. v. Plunkett, 25 Kan. 188; Fay v. Minneapolis & St. Ry. Co. (Minn.), 11 Am. & Eng. R. Cas. 195; Covey v. Railroad Co., 27 Mo. App. 170; Standard L. & A. Ins. Co. v. Jones, 94 Ala. 434; Gregory v. Ohio River R. Co., 37 W. Va. 606; Little Rock M. R. & L. R. Co. v. Leverett, 48 Ark. 333; Carroll v. East Tenn. V. & G. R. Co., 82 Ga. 452. See also, Indiana, I. & I. R. Co. v. Bundy (Ind.), 14 Am. & Eng. Cas., N. S., 660, and *note*, 677.

**Same—Same—Injury Must Be Proximate Result of Violation.**—If an employee intentionally disobeys a reasonable rule or regulation established for his safety, unless he does so under the influence of fear, produced by the appearance of sudden danger, and the act of disobedience is the proximate cause of the injury complained of, he cannot recover. Gulf, Western Texas & P. R. Co. v. Ryan, 69 Tex. 665; Lyon v. Railroad Co., 31 Mich. 429; Railroad Co. v. Rhodes, 56 Ga. 645; Ford v. Fitchburg R. Co., 110 Mass. 240; Central R. Co. v. Mitchell, 63 Ga. 173; Haakin v. New York, etc., R. Co., 65 Barb. (N. Y.) 129; Richmond & D. R. Co. v. Pannil, 89 Va. 552; Railroad Co. v. Cottrell, 83 Va. 512; San Antonio & A. P. R. Co. v. Wallace, 76 Tex. 636.

The mere fact alone that the injuries received by an employee of a railroad company were inflicted while such employee was acting in disobedience of known rules, will not relieve the master of liability; but if the violation in whole or in part of such rules is the cause of the injury, it will prevent a recovery by the employee. San Antonio & A. P. R. Co. v. Wallace, 44 Am. & Eng. R. Cas. 564, 76 Tex. 636, 13 S. W. Rep. 565; La Croy v. New York, L. E. & W. R. Co., 4 Silv. App. 123, 132 N. Y. 570, 30 N. E. Rep. 391, *reversing* 57 Hun 67.

A brakeman who wilfully and unnecessarily violates a reasonable precautionary rule known to him, or which he must be taken to have known, cannot recover for an injury of which such violation of the rule is the direct efficient cause. Johnson v. Chesapeake & O. R. Co., 38 W. Va. 206, 18 S. E. Rep. 573.

The fact that a brakeman in coupling cars violates one of the rules of the company in the manner of doing his work will not defeat a recovery for an injury caused by a defect in the cars, where it appears that the injury would not have been avoided by an observance of the rules. Reed v. Burlington, C. R. & N. R. Co., 31 Am. & Eng. R. Cas. 190, 72 Iowa 166, 33 N. W. Rep. 451.

## LOUISVILLE &amp; N. R. CO.

v.

## HILTNER.

(Court of Appeals of Kentucky, Dec. 22, 1900.)

[60 S. W. 2.]

**Injury to Employee—Effect of Contributory Negligence in Failing to Obey Rules.**\*—If a locomotive engineer injured in a rear-end collision violated a rule of the company prescribing the distance at which he

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\*See preceding case, and *notes*.

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should follow the train in front of him, and but for that fact he would not have been injured, he cannot recover, notwithstanding the negligence of other servants of the company.

**Same—Contributory Negligence—Instructions.**—Defendant cannot complain that the instructions given on motion of plaintiff failed to tell the jury that plaintiff could not recover if he violated a rule of the company prescribing the distance at which one train should follow another, as the court by those instructions told the jury that plaintiff could not recover if by the exercise of ordinary care he might have prevented the injury, and, on defendant's motion, instructed the jury in general terms, as to contributory negligence; no more specific instruction as to plaintiff's violation of the rule being asked.

**Same—Habitual Disregard of Rules—Abrogation.\***—Evidence that a rule of the company limiting the speed of trains was habitually disregarded was admissible to excuse plaintiff's violation of the rule.

HOBSON, J., dissenting.

Petition for rehearing. Granted.

For former report, see 56 S. W. 654.

Paynter, J. Appellee, Norman Hiltner, instituted this action to recover for personal injuries received by him while in the service of appellant as a locomotive engineer on one of its freight trains between Guthrie and Earlington, Ky. On the day on which he was injured he left Earlington with his train to take it to Nashville, but, on arriving at Guthrie, received orders to abandon his trip to Nashville and to return to Earlington that night. The train on the return trip consisted of his engine, two empty cars, and a caboose. A passenger train known as "No. 56," or the "Hopkinsville Accommodation," was due to leave Guthrie for Hopkinsville at 8 p. m., and he was ordered to follow it. This train, however, was late that night, from having to wait for a connection, and did not leave there, according to the register, until 8:15 p. m., or, as shown by the evidence, some minutes after this, from the fact that the conductor, after registering, was delayed a few moments by some passengers who had not tickets. Four miles north of Guthrie this train stopped at a flag station known as "Moore's" to put off three passengers for that point, and, just as it started from this station, appellee, following it with his train, ran into it with his engine, injuring several passengers, and wrecking the rear coach of that train. When appellee saw that a collision was inevitable, he jumped from the engine, sustaining injuries necessitating the amputation of one of his legs, and causing him great pain and suffering. He alleged that Moore's was not known as a station, and that he never knew it as a station or stopping place; that those in charge of the passenger train took no precautions to warn him of its stop there; and that his injuries were due to gross negligence on their part in stop-

\*See preceding case, and notes.

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ping there, and knowingly permitting him to run upon the passenger train with his engine, without notice or warning to him of the danger. He also alleged that in order to warn engineers and conductors where they might expect trains to stop, to guard them against accidents, it was the rule of appellant, and its duty, to furnish them a time card containing the time of the running of all its trains, and the places at which they would stop, but that appellant, by gross negligence, furnished him a time card which did not show Moore's as a station, and in no way notified him that any of its trains stopped there, or that it was a station at all. Appellant, by its answer, denied any negligence on its part or those in charge of the passenger train, and pleaded, in substance, that the collision was due to the fault of appellee, and thereby a great loss was inflicted on it. There have been three trials of the case. On the first trial the jury failed to agree. On the second they found a verdict for appellee for \$8,500, which, on motion for a new trial, the court set aside. On the third trial the jury found a verdict for appellee for \$7,500, and, the court having overruled a motion for a new trial, the railroad company prosecutes this appeal, and appellee a cross appeal, insisting that the court erred in setting aside the verdict for \$8,500.

Appellee testified that he left Guthrie at 8:20, which was his leaving time, as shown by the register, and that the collision occurred at 8:30, when, according to its running time, the passenger train should have been nearly at Trenton, a station some four miles north of Moore's, where in fact he supposed it was until he suddenly saw it about six car lengths in front of him; that it was a dark, rainy night, and the smoke from the passenger train prevented him from seeing the red lights at its rear until then. The schedule time of the passenger train was 35 or 40 miles an hour. According to this, it could have run to Moore's in about six or seven minutes, and, if it left Guthrie at 8:15, it should have reached Moore's about 8:21 or 8:22. There was a rule of the company requiring a flagman to be sent back to give notice to a following train in case a stop of over three minutes, and no flagman was sent back on this occasion by the passenger train. Appellee also testified that he did not know that Moore's was a station, or that any trains stopped there, and that it was not on the time card furnished him by the company to inform him where trains stopped.

It is clear from the proof that Moore's had been a flag station at which the local trains stopped for something like 20 years. There had been at one time a shed there, but it had rotted down, and there was at the time of the collision no shed or platform to indicate a station. Appellee had been running on the road about three years, but a part of this time had been on another branch. The proof for appellee showed that the passenger train left Guthrie at 8:20, and that the collision

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occurred at 8:27. There was a rule of the company forbidding a freight train from leaving a station to follow a passenger train until five minutes after its departure. The rules required passenger trains running in the same direction to keep not less than ten minutes apart. Freight trains following each other were also required to keep not less than ten minutes apart, and a train of inferior class, it was provided, must in all cases keep out of the way of a train of superior class. The rules also limited the speed of freight trains to 25 miles an hour, and passenger trains to 50 miles an hour; but the proof showed that the rules as to speed was habitually violated by trainmen, with the acquiescence of the company. The evidence tends strongly to show that appellee left Guthrie within less than five minutes after the departure of the passenger train, although there is some testimony to support his statement that he did not leave until five minutes after its departure. This testimony is given by some persons fishing about a half mile from the railroad, and others who were in bed, or had no timepiece, and only guessed at the interval between the two trains. On the other hand, there is testimony by a number of witnesses of a much more satisfactory character. Appellee says he was running from 30 to 35 miles an hour. Other witnesses say he was running as fast or faster than the passenger. When he left Guthrie he himself says he could still see the red lights on the rear of the departing passenger train. A witness who lived 2 miles from Guthrie was approaching the railroad track, and stopped for the passenger to pass the crossing. Immediately after it passed he went upon the track, and the freight following it was then at a road crossing between him and Guthrie, and about a mile from him. It passed him before he left the railroad. Another witness, who lived nearer Moore's, and heard the passenger train whistle for the station, heard at the same time the freight train whistling for a road crossing a mile and a half south of the station. There were three passengers for Moore's,—colored people,—sitting about the middle of the front half of the passenger coach, next to the engine. As soon as the train stopped they got off, and when the first one of them got to the ground he saw the freight train just in the rear of the passenger, and the collision occurred before any of these passengers got away from the train, although they saw the danger and tried to climb up the bank. The conductor had not finished taking up his tickets, and as soon as these men got off went back to finish, but before he got to the passenger the collision occurred. The rear brakeman called out for passengers to alight, but says before he could do anything else, after the train stopped, the freight was upon him. This testimony is substantiated by persons remaining on the train, as well as those who got off. One witness, who testifies very intelligently, saw the passenger train pass his house, and heard it whistle for Moore's and then noticed the freight so quickly following it that he anticipated a collision, and listened to

hear the passenger train start from Moore's. If the stop at Moore's was no longer than shown by this evidence, it was impracticable to have sent back a flagman to give the freight notice of the stop, and unnecessary to do so; it being only a usual stop, and the station being a regular stopping place when necessary.

On this evidence the court instructed the jury as follows: "No. 1. It was the duty of the defendant to give to the plaintiff such information respecting the movement and stopping place of the other trains on the road where plaintiff was acting as engineer as would enable him, by the use of ordinary care, to escape a collision with any of such trains; and if they believe from the evidence that the plaintiff did not have such information, and was injured as the direct and natural consequence of the negligence of the defendant in failing to give such information to him, if there was any such negligence, they must find for the plaintiff, unless they further believe from the evidence that the plaintiff by the use of ordinary care could have escaped injury, notwithstanding the said negligence of the defendant, if it was so negligent. And if they find from the evidence that as a consequence of such negligence above stated, if there was any, the plaintiff was placed in a position which a man of ordinary prudence and fortitude would have considered as one of immediate danger to his life, he had the right to jump from his engine to escape such apparent danger, though it might not have been real danger. No. 2. If the jury believe from the evidence that on the occasion in controversy plaintiff was injured, and that his injury was the direct and natural result of the gross negligence of defendant's agent and servants in charge of train No. 56, they should find for him such compensatory damages as will fairly and reasonably compensate him for such injuries, not to exceed \$20,000, unless they further believe from the evidence that, in receiving his injuries, plaintiff was himself negligent, and that his said negligence, if any, so far contributed to his injuries that he would not have been hurt but for his own negligence, if any. No. 3. 'Negligence,' as used in the instructions, means, when applied to plaintiff, a failure to exercise ordinary care to protect himself from injury; and 'ordinary care' means such care as an ordinarily prudent man would exercise to protect himself from injury under the same or similar circumstances."

It was clearly gross negligence in the railroad company to run two trains as close together as these were, and have those in charge of the rear train ignorant of the stops to be made by the one in front; and, as to third persons, it was liable for the consequences of such neglect, without regard to the question who was to blame for this state of things. But appellee was running the rear train. Upon his management of it the lives of the passengers on the other train depended. The law, in its regard for human life, required him strictly to follow

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the rules, and not to leave Guthrie within five minutes after the departure of the other train, and to run that much behind it. In addition to all other precautions to prevent rear-end collisions, this was incumbent on him; and, however negligent others may have been in observing other precautions, appellant is not liable to him, if he was himself at fault, but for which the accident would not have occurred.

To this point the opinion delivered by Judge Hobson in this case has been used.

The principal alleged acts of negligence relied upon by the defendants in its effort to show that the plaintiff was guilty of contributory negligence were that the train upon which the plaintiff was engineer started within less than five minutes after No. 56 had left Guthrie, and that his train was run at a forbidden rate of speed between Guthrie and Moore's, where the accident occurred. Testimony was offered on the issue thus raised by both plaintiff and defendant. Contributory negligence is a defense, and it was relied upon in this case by the defendant. It averred the acts which it claimed amounted to contributory negligence, and it offered an instruction embodying the form in which it desired the question to be submitted to the jury, as is shown by the instruction, which reads as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff's own negligence, if any, contributed to his injury complained of, to such an extent that said injury would not have occurred but for his own negligence, if any, they must find for the defendant on the claims sued on by the plaintiff." It will be observed that in instruction No. 1 given on motion of the defendant the question of contributory negligence was submitted to the jury. In instruction No. 5 the jury was again told that the plaintiff was not entitled to recover if he was guilty of contributory negligence. So the court gave instructions, both of the plaintiff and defendant, submitting the question of contributory negligence in the exact form asked and desired by it, and in more than one instruction. From the testimony in this case, and from the instructions given to the court, a jury of the most ordinary intelligence could not have failed to understand the acts which were relied upon as amounting to contributory negligence. An instruction was not asked by the appellant, telling the jury that if appellee's train left Guthrie within less than five minutes after the passenger train had left, and that the accident would not have happened except for that fact, then the appellee was not entitled to recover. As such an instruction was not asked by the appellant, it is not entitled to complain on this appeal that it was not given, even if such an instruction had been a proper one. So far as we are aware, an unsuccessful litigant has never procured a reversal of a case because the court gave an instruction to the jury upon a given subject in the exact terms asked by him. As early as 1823, in *Clift v. Stockdon*,

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4 Litt. 215, this court held that one cannot assign for error an erroneous instruction obtained on his own application. Under the rule of this court, if the defendant had not asked for an instruction upon the subject of contributory negligence, and the court had failed to give one on that subject, it would not be entitled to a reversal. *White v. Cole* (Ky.) 47 S. W. 759; *Railway Co. v. Moats* (Ky.) 50 S. W. 31. How much less is the defendant entitled to a reversal in this case, where he got the instruction which he moved the court to give upon the subject of contributory negligence! As an instruction was not asked for or given on the question of the alleged violation of the rule forbidding the departure of appellee's train until after the lapse of five minutes after the passenger train had left, the question is not before us as to whether it should have been given in addition to the instructions on contributory negligence. The evidence that the rule of the company limiting the speed of trains as habitually disregarded, with its knowledge, was properly admitted. *Railroad Co. v. Bowcock* (Ky.) 51 S. W. 580. The judgment is affirmed on original and cross appeal.

Some-Habitual  
Disregard of  
Rules-Abroga-  
tion.

Hobson, J. I concur in the opinion of the court so far as it is in accord with the opinion of the court heretofore delivered. But, for the reasons stated in that opinion, I am of opinion that the ends of justice require a new trial. The fundamental error in the instructions of the court, given over appellant's objections, is that they eliminate obedience to the rules entirely from the case, and authorized the jury to find for appellee, though by his own disobedience of the rules he caused the collision, if the jury thought it was not negligence on his part not to obey them. I therefore dissent from the judgment of the court.

RUSH

v.

SPOKANE FALLS & N. RY. CO.

(*Supreme Court of Washington, Dec. 13, 1900.*)

[63 Pac. Rep. 500.]

**Pleading—Conclusions of Fact.**—Where a complaint alleged that an engine was defective, and that through the negligence of the defendant it emitted large quantities of sparks from its smokestack in close proximity to an explosive substance in the caboose, and that the use of the engine in such condition was gross carelessness, causing an explosion, by which plaintiff was injured, such averments of negligence, being conclusions from the facts stated, did not preclude proof of other negligence alleged in the complaint that defendant was careless in placing the explosive in the caboose, and in not warning plaintiff of its presence.

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**Injury to Employee—Explosion—Defective Engine—Question for Jury.**—In an action by an employee of a railroad for injuries caused by an explosion of dynamite carried in the caboose, whether evidence that "sparks were flying all the time" tended to show that the engine was in a defective condition was a question for the jury.

**Vice Principals—Servant Given Charge of Dynamite.\***—An employee who is given charge of dangerous instruments, such as dynamite, represents his master in the care and custody thereof, and is not a fellow servant, and hence the master is liable for injuries to employees through negligence in the care of such articles.

**Instructions.**—In an action for injuries to a railroad employee the alleged negligence consisted in placing a box of dynamite in an open caboose, which carried its employees. An instruction that it was the duty of the master to ascertain and make known to his servants the danger of this explosive, and the proper method of handling it with safety, and that the ignorance of the master thereon would furnish no excuse if he could, by reasonable diligence and ordinary care, have obtained such knowledge, was not objectionable as irrelevant to the issues.

**Injury to Employee—Shipping Explosives—Instructions.**—An instruction, in an action for injuries, that, if the jury believed it was dangerous to ship and handle dynamite in the caboose car of a train with the doors open, and that such danger could have been avoided if a safer way, known or easily capable of being learned by the master, had been adopted, then it was the duty of the master to his servants to adopt such safer way, was not erroneous on the ground that no allegation or proof of a safer method was shown, since there was a patent danger in so shipping such an explosive.

**Instructions.**—Where an instruction, otherwise proper, does not fully cover a point in issue, the remedy is to ask for further instructions thereon.

**Same.**—Where an objection to a part of an instruction on the ground that it was outside the case was valid, but the objection went to the whole instruction, which was not subject to such objections, it was not error to overrule the same.

**Injury to Employee—Explosion of Dynamite in Caboose Conveying Employee to Work—Duty of Master to Furnish Safe Place—Degree of Care—Instructions.**—Where an employee of a railroad company was injured by an explosion of dynamite in a caboose furnished to employees to convey them to work, an instruction that the master, in employing a servant, impliedly engages with him that the place in which he is to work or in which he is to be placed shall be reasonably safe, was not erroneous as not bearing on the issue, since the company impliedly engaged with the employee that such caboose was reasonably safe for the purpose for which it was used.

**Same—Care Required of Master as to Custody of Explosives.**—Where there was some evidence that employees were smoking cigarettes and scuffling in a caboose in which an explosion of dynamite occurred, by which plaintiff, an employee, was injured, refusal to give an instruction that if the jury found the explosion might have been caused thereby,

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\*See notes at end of case.

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and that there was just as much probability that it happened in that way as by sparks from the engine coming through the open door of the caboose, then they should find for the defendant, was not error, since the railway company had not exercised the highest degree of care imposed on it by reason of its custody of such dangerous explosive.

**Excessive Verdict.**—A verdict for \$1,200 for injuries sustained by plaintiff in an explosion, whereby he was stunned, bruised, and otherwise injured, was not so large as to indicate passion and prejudice on the part of the jury, and hence not reversible error.

Appeal from superior court, Spokane county; William E. Richardson, Judge.

Action by James Rush against the Spokane Falls & Northern Railway Company to recover for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Albert Allen and Jay H. Adams, for appellant.

William H. Ludden and James Z. Moore, for respondent.

Anders, J. In April, 1897, the respondent, James Rush, was in the employ of the Spokane Falls & Northern Railway Company, appellant, in the capacity of a common laborer, and was engaged with others in riprapping and repairing its roadbed in the vicinity of Marcus and Bossburg, in this state. It was the duty of the respondent, in the course of his employment, to load and unload rock, which was transported on appellant's cars from a quarry near the railroad track to places where it was needed. Dynamite or giant powder was used in blasting rock at the quarry, but the respondent had nothing to do with blasting, or with handling or using explosives. It was the custom of the railway company to convey its employees from their boarding camp to their work on its cars, and, accordingly, on April 28, 1897, a caboose attached to an engine was taken to the camp where the respondent and from 10 to 14 other laborers were boarding and lodging for the purpose of transporting them to the place where they were required to work on that day. Before the train reached the place where these workmen were, a box containing dynamite and fuse had been placed in the caboose near one of its two side doors (both of which were left open) by one Harklerode, who was at the time the foreman of this gang of laborers. The fuse was wrapped in paper, and laid on top of the giant powder, and the box containing both of these substances was left uncovered. After the respondent and the other men of his gang, their foreman, and Rogers, the superintendent of the work, had boarded the caboose, and proceeded several miles towards their destination, it was discovered by some one in the car that the paper covering the fuse was on fire. When the men became aware of the danger to which they were thus exposed, they were greatly alarmed and confused, and instantly undertook to get off the

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caboose. Some of them, it appears, jumped off at once, regardless of consequences. At the time the fire was discovered, the train was running at its usual rate of speed, but it was "slowed up" almost immediately thereafter. On discovering his perilous situation, the respondent passed out of the car by way of the rear door, and sat down on the step or platform, intending to jump off as soon as the speed of the car would permit him to do so with safety. While the respondent was in that position, and the train still in motion, the powder exploded with such violence that the top and sides of the car were entirely destroyed, and the respondent was thrown upon the ground, and thereby stunned and bruised, and, as he claims, otherwise injured. This action was instituted to recover damages for the injuries thus sustained by the respondent, on the theory that the explosion was caused by the negligence of the appellant. The particular acts of negligence or breaches of duty charged against the appellant are set forth in the complaint as follows: "(6) That the engine to which said caboose was attached was in a defective and wornout condition, and was so negligently and carelessly managed by defendant it emitted large volumes of smoke and sparks from the smoke-stack and furnace thereof; that the use of said engine in such condition and in the proximity to said explosive substance was gross carelessness on the part of said defendant; that, if defendant had exercised ordinary care in and about the construction and care of said engine, said sparks would not have emitted, and the explosion hereinafter mentioned would not have occurred. (7) That on the said 28th day of April, 1897, while the plaintiff was on board of said caboose, and riding thereon to his place of labor, as directed by said defendant, said explosive substance was ignited by the sparks and the fire emitted by said engine, and without warning, and without plaintiff having an opportunity of saving himself from injury, the said explosive substance exploded with terrific force and violence, and caused the injury to plaintiff herein mentioned; and that said explosion and the injury received by plaintiff hereinafter mentioned were caused by gross carelessness and negligence of the defendant, and without negligence or fault on the part of this plaintiff. (8) That said explosive substance—giant powder or dynamite—was concealed in said caboose, and covered up in such a way by defendant that plaintiff was unable to learn or discover that the same was an explosive substance; and the said explosive substances and the manner in which they were covered up and concealed from this plaintiff constituted a latent danger then well known to the defendant, but unknown to the plaintiff; and while said latent danger existed on said caboose as aforesaid the said defendant ordered plaintiff on board of said caboose, and placed him in close proximity to said explosive substance, and put him in imminent danger of his life. That the defendant was grossly careless and negligent in storing and carrying said explosive sub-

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stance in said caboose, and in ordering plaintiff near it without plaintiff's knowledge, and in using a defective engine, and in the negligent and careless management of said engine; and that defendant was grossly careless and negligent in not warning plaintiff of the danger to which he was exposed; and defendant was negligent and careless in allowing said explosive substance to remain in a place where it was probable and likely that it would be exploded by sparks coming from said engine, which would be likely to fall therein and thereon." The appellant, in its answer, admitted that it was a corporation operating a railway as a common carrier, as alleged by respondent, but denied all the remaining averments of the complaint. And by way of defense the appellant alleged that, if the respondent was injured in any manner while in the employ of the appellant, such injury was occasioned by his own want of care and contributory fault, and that any such injury so received was the result of the ordinary risk which the respondent assumed by reason of his employment. The new matter set up in the answer was controverted by the reply. A trial of the issues involved was had to a jury, resulting in a verdict and judgment for the plaintiff (respondent here) for \$1,200.

At the close of respondent's testimony the appellant challenged the legal sufficiency of the evidence, and moved the court to take the case from the jury, in accordance with section

**Findings—Conclusions of Fact.**

4994, Ballinger's Ann. Codes & St. This motion was denied, and the appellant excepted.

The motion was renewed at the close of the evidence, and again denied by the court, and the appellant now contends that the trial court erred in refusing to discharge the jury, and direct the entry of judgment in favor of appellant, as requested. In support of this contention it is urged that there was absolutely no proof at the trial of the particular negligence with which appellant was charged in the complaint, and that there was, therefore, as a matter of fact, nothing for the jury to determine. In proof of appellant's position it is asserted that paragraph 6 of the complaint not only designates the specific negligence on the part of the appellant which is relied on for a recovery, but avers that such negligence was the proximate and only cause of the explosion which resulted in the injury to the respondent; and that, in view of these particular allegations of negligence, all the other averments of the complaint respecting the placing of the giant powder in the caboose, and the want of knowledge on the part of the respondent of its presence there, are mere matters of inducement, and are made to show that the respondent did not assume the risk of an explosion by riding in the caboose. This objection was made and decided adversely to the contention of the appellant in *Allend v. Railway Co.*, 21 Wash. 324, 58 Pac. 244, in which case the plaintiff sued the appellant here to recover damages occasioned by the same explosion, and in which the complaint contained

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substantially the same allegations of negligence as are set forth in the complaint herein, and now under consideration. In that case it was held that the plaintiff was not precluded by such allegations as those set out in paragraph 6 of the complaint from proving any other negligence alleged in the complaint. That case is decisive of the point here in question, and no further argument of the proposition is necessary.

It is true, as claimed by appellant, that there was no proof whatever at the trial that the engine in question was negligently managed, but there was certainly some proof, which,

**Injury to Em-  
ployee—Explo-  
sion—Defective  
Engine—Ques-  
tion for Jury.**

unexplained as it was, tended to show that it was in a defective condition; the undisputed testimony being that "there were a lot of sparks flying all the time" from the engine. It is claimed,

however, that, inasmuch as there was no evidence that any one saw a single spark from the engine come into the caboose or fall upon the paper which was ignited in the box of dynamite, no inference that the locomotive engine was defective could be drawn from the mere fact that it emitted sparks. It is, we think, a sufficient answer to this proposition to simply observe that that was a question for the jury to determine, in view of all the circumstances, under proper instructions by the court. But it is further insisted that, even if it be true that the emission of sparks raised a presumption that the locomotive was defective, still no actionable negligence is made to appear in this case, for the reason that the acts of Harklerode and other employees of the appellant were those of a fellow servant, for which the railway company is not responsible. For the reasons given in the opinion in the Allend Case, this position is entirely untenable. Even if it were conceded that Harklerode was a fellow servant with the respondent when engaged in loading and unloading cars in the ordinary course of his employment, yet it would by no means necessarily follow that he was such fellow servant while acting as custodian of dangerous instruments, such as dynamite. In that capacity he undoubtedly represented the appellant, and his negligence was legally imputable to the appellant.

**Vice Principals  
—Servant Given  
Charge of  
Dynamite.**

The court instructed the jury to the effect that before using or handling a dangerous explosive it is the duty of the master to ascertain and make known to his servants the dangers to be reasonably apprehended from its use, and the proper method of handling it with reasonable safety; and the ignorance of the master as to the danger to be apprehended from its use or the proper method of handling it will furnish no excuse if the master, by the exercise of such reasonable diligence and ordinary care as a reasonable and prudent man under like circumstances would use, could have obtained such knowledge. That this instruction announced the law correctly, as a general proposition, is not disputed; but appellant insists that it was misleading, and, therefore,

**Instructions.**

erroneous, because it was neither applicable to the pleadings nor to the testimony adduced at the trial. It is no doubt true, as appellant contends, that the instructions of the court to the jury should be relevant to the issues and pertinent to the evidence in the case; and the question to be determined is whether the instruction in question is so clearly violative of this settled rule as to warrant the reversal of the judgment. We are not satisfied that it is. One of the principal questions for determination at the trial in the court below was whether the appellant was guilty of negligence in placing the box of dynamite in the car in the place and in the condition above mentioned, and, in order to enable the jury to determine that question properly, it was necessary for the court to instruct them as to the duty of the appellant to its servants before using or handling dangerous explosives. It is admitted that the respondent and the other men who were with him in the caboose were appellant's servants, and the testimony shows that the respondent was not informed as to the presence of the dynamite in the car, and had no knowledge of it until the fire was discovered. Upon this state of facts it can hardly be said that this instruction was inapplicable to the pleadings or to the evidence.

Instruction numbered 2 given by the court to the jury is to the effect that, if the jury believe from the evidence that it was dangerous to ship and handle dynamite in the caboose car with the doors open, and that such danger could be avoided and greatly reduced by shipping it in some safer way which was in easy reach of the master, and that the existence of such danger

Injury to Em-  
ployee—Shipping  
Explosives  
Instructions.

and the means of avoiding or reducing it were known to, or could have been known by, the master by the exercise of reasonable care and diligence, it was the duty the master owed his servants to adopt such method of shipping such dynamite as was reasonably safe; and any other method which was not reasonably safe will not excuse the master for injuries to the servant resulting therefrom. It is urged that this instruction is erroneous for the reason that it does not appear from the allegations or proof that any safer method existed for handling or shipping dynamite or giant powder than that made use of in the case at bar, or that, if any safer way existed, it was within the reach of the railway company. We are unable to discover any merit in appellant's criticism of this instruction. It would be difficult to imagine a more unsafe method of shipping dynamite than that adopted in this instance by the appellant. It is perfectly apparent that the danger of an explosion would have been greatly reduced, if not absolutely avoided, by putting an ordinary wooden cover on the box, and which was presumably within reach of the appellant.

Error is also predicated upon the third instruction given to the jury. In that instruction the jury were charged that the



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servant assumes the ordinary risk incident to the service after the master has used such care as a reasonable and prudent man would exercise under like circumstances, when using dynamite or giant powder, for the safety and protection of the servant, commensurate with the danger to be reasonably apprehended from the service; and if the master fails to use such care and caution, and an injury results therefrom, it is not a risk incident to the employment, and the master is liable therefor, unless the danger was open and apparent, or the servant had actual knowledge thereof. It is not contended that the court did not state the law correctly in this instruction, but it is claimed that it should have gone further, and explained to the jury the application of the law to the case on trial in view of the pleadings and evidence. All that need be said in answer to this objection is that, if appellant desired further instructions upon this point, it should have requested the court to give them at the proper time.

It is also claimed that the court erred in charging the jury that in using high, dangerous explosives the master owed a duty to the servant to employ experienced agents who knew the danger ordinarily incident to its use, and the proper method of manipulating it with reasonable safety, and have the servant whose duty it is to come in contact therewith properly instructed and informed as to such danger. It is urged by the appellant that this instruction is objectionable for the reason that there is no allegation or proof respecting the particular matters therein mentioned. Had the appellant limited his exception at the trial to that part of instruction numbered 4 here complained of, there would be more force in its contention. But its exception went to the entire instruction, which, as a whole, is not subject to the only objection urged against it, namely, that it is outside of the case as made before the jury.

Nor do we see any substantial merit in appellant's objection to that part of the seventh instruction wherein the jury were told that, if they believed from the evidence that said dynamite, by the negligence of the defendant railway company, was exploded without any fault of this plaintiff, and that the plaintiff sustained injuries by reason of such explosion, then they should find a verdict for the plaintiff. The contention that the court erred in giving this instruction is based solely on the proposition that it failed therein or elsewhere to define the negligence for which the appellant would be liable in the case at bar. This is but another instance of an objection, not to what the court did say to the jury, but to what it did not; and we have already pointed out the remedy which ought to be pursued in such cases. See, also, *Allend v. Railway Co.*, supra.

It is further contended that the court erred in charging the jury that the master, in employing a servant, impliedly engages

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**Injury to Em-  
ployee—Explo-  
sion of Dynamite  
in Caboose Con-  
veying Employee  
to Work—Duty  
of Master to  
Furnish Safe  
Place—Degree  
of Care—In-  
structions.**

with him that the place in which he is to work, and the tools, machinery, and surroundings of his work, or in which he is to be placed, shall be reasonably safe. In support of this contention it is urged that the question whether the respondent had been furnished with a safe place in which to do his work was in no wise involved in the case. It must be conceded, as claimed by appellant's counsel, that the respondent, when he was riding in the caboose, was not in a place provided him wherein to work; but it was, nevertheless, a place where he had a right to be at the time, and we think it is quite clear that when the appellant furnished him a caboose in which to ride it impliedly engaged with him, as the learned trial court observed, that it was "reasonably safe" for that purpose.

The instruction given to the jury upon the question of fellow servants is also complained of, but, as what we have already said upon that subject disposes of the objection, no further comment is necessary.

There was some testimony upon the trial to the effect that before the explosion in question occurred some of the men who were in the caboose were smoking cigarettes and scuffling, but whether these men were near the box of dynamite or in some other part of the caboose at the time is not disclosed by the evidence. In view of this testimony the appellant requested the court

**Same—Care Re-  
quired of Master  
as to Custody  
of Explosives.**

to charge the jury that: "If you find from the evidence that the co-employees of the plaintiff, while riding in the caboose where the giant powder or other explosive was being carried, and that some of the co-employees or fellow servants of plaintiff were smoking cigarettes in such caboose, and scuffling therein, and that the said explosive might have become ignited from the fire in smoking cigarettes, and that there is as much probability that the explosion happened in that way as from sparks from the engine, then you should find for the defendant." The court refused to instruct the jury as thus requested, and this ruling of the court is assigned as error. At first blush we were inclined to the opinion that this instruction should have been given as requested, and that the refusing to give it was prejudicial error; but upon further reflection, and in view of the duty imposed by law upon those who use or have the custody of dangerous instruments or agencies to exercise the greatest care to prevent others from being injured thereby, we have concluded that the request was properly refused. According to the better authorities, it was the duty of the railway company to exercise the highest degree of care and diligence in the custody of the dynamite, in order to protect those who were in the caboose from injuries which would probably and naturally result from an explosion of it, and, not having done so, it must be held liable for the consequences of its want of care. It is said by Shearman & Redfield, in

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section 154 (5th Ed.) of their work on Negligence, that "a master who intrusts a servant with the charge of some inherently dangerous thing (e. g. an explosive) is responsible for the omission of the servant to keep it safely, and, therefore, for his malicious use of it for mischievous purposes." And in *Railway Co. v. Shields*, 47 Ohio St. 387, 24 N. E. 658, it was held (quoting from the syllabus, which correctly states the conclusions of the court) that: "The law requires of those who use dangerous agencies in the prosecution of their business to observe the greatest care in the custody and use of them. This duty cannot be shifted by the master from himself to his servants, so as to exonerate him from the negligence of the servant in the use and custody of them. Where they are so intrusted, the proper custody, as well as the use of them, becomes a part of the servant's employment by the master; and his negligence in either regard is imputable to the master in an action by one injured thereby." In that case the railway company was held liable for injury to a small boy, caused by the explosion of a torpedo negligently and wantonly left on its track by one of its servants at a place where children and others living along the line of the track were in the habit of passing with the knowledge and acquiescence of the company. The torpedo was picked up by one of the companions of the plaintiff, and caused to be exploded by hitting it. In the well-considered case of *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, in which the opinion of the court was delivered by Judge Cooley, an owner of land was held liable for injuries occasioned to a child by the explosion of a dynamite cartridge which he had left in an open shed on his premises in a box of sawdust, and which the child discovered and exploded by striking it with a rock. And in *Tissue v. Railroad Co.*, 112 Pa. St. 91, 3 Atl. 667, it was ruled that it is the duty of the master to know, as far as it is possible to know, the character of such material as dynamite which he places in the hands of his agents; and, if he negligently places it in such a position as to expose his servants to a danger to which they might not be exposed, he is liable for any damages resulting from such negligence. And it was there held that it was a question for the jury to determine whether it was negligence on the part of the railroad company to permit a large quantity of dynamite to be stored in such a position that an accidental explosion of it might result in death or injury to its servants. In that case a servant of the defendant company was killed by the explosion of dynamite which was used in the business of the defendant, and stored near the railroad track where the servant was required to work. What caused the explosion was not disclosed by the evidence, and the trial court directed a verdict for the defendant, but on appeal to the supreme court the judgment was reversed. See, also, *Allison v. Railroad Co.*, 64 N. C. 382.

Although it appears to us from the evidence that the jury

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was somewhat liberal in awarding damages to the respondent, the amount is not so large as to indicate passion or prejudice on their part, and we therefore do not feel at liberty to disturb the verdict on the ground of excessive damages.

Excessive  
Verdict.

It is claimed by appellant that the court erred in the reception and rejection of testimony during the trial, but we are of the opinion that the objection to the ruling of the court in that regard is not well taken. The judgment is affirmed.

Reavis and Fullerton, JJ., concur.

Dunbar, J. C. I am unable to understand the application of the authorities cited in the opinion to the instruction last commented upon. It seems to me that the quotations from Shearman & Redfield and from the case of *Railway Co. v. Shields*, 47 Ohio St. 387, 24 N. E. 658, amount to nothing more than an announcement of the general rule that the master is liable for the negligence of the servant, just as he would be if a conductor negligently operated a train. In such a case the custody and use of the train become a part of the servant's employment by the master, and the master cannot escape responsibility to one who is injured. The same may be said of *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257. In none of these cases is the question of fellow servant involved. The plaintiffs who were injured were all strangers, and the rule is laid down with reference to the responsibilities of the masters to strangers. *Tissue v. Railroad Co.*, 112 Pa. St. 91, 3 Atl. 667, bears more nearly on the question involved, but it does not seem to me that it is exactly in point, for it does not appear there that the explosion was caused by the action of a fellow servant. But the rule is announced that the company is responsible to its servants when it permits a dangerous explosive to be placed in such quantity and position that an accidental explosion may result, and that the master will be responsible to his servant for damages arising from such negligent placing. I think, however, that any one who handles dangerous explosives should be held to the highest degree of care; that he should be as careful of the safety of his servants as of the safety of strangers; and that when the defendant shipped the powerful explosive which it did in this case in the manner which the testimony indicates, without sufficient covering, it was guilty of willful negligence, and ought to be held responsible for the injuries inflicted upon the plaintiff in this case, even if it be conceded that it was the negligent act of a fellow servant which caused the explosion, when it is shown, as it is in this case, that the plaintiff was not aware of the exposed condition of the dynamite. The duty should not be imposed upon him to contemplate the existence of such a hidden danger, or to guard against it. For this reason I concur in the judgment announced.

NOTES.

**Fellow Servants—Blasting Crew and Foreman Having Charge of Dynamite.**—The mere fact that a foreman has the oversight of a certain

## Lemasters v. Southern Pac. Co

business, such as handling dynamite cartridges used in blasting, and that he received a higher compensation than the rest of the gang, does not make him the less their fellow-servant. *Sullivan v. New York, N. H. & H. R. Co.*, 62 Conn. 209, 25 Atl. Rep. 711.

**Same—Teamster and Blasters.**—One who is engaged in hauling rock by means of a team, and those who are engaged in blasting such rock, all employed by a common master, are fellow servants; and such facts being shown by a complaint to recover for an injury to the teamster, an averment that the injured servant "had no connection whatever with any of the employees of the defendant who were engaged in blasting rock" is a mere conclusion, and the facts will control. *Bogard v. Louisville, E. & St. L. R. Co.*, 100 Ind. 491.

**Criterion of Fellow Service.**—See *Norfolk & W. R. Co. v. Houchins' Adm'r (Va.)*, 8 Am. & Eng. R. Cas., N. S., 616, and *note* by Mr. McKinney, p. 630.

## LEMASTERS

v.

SOUTHERN PAC. CO. (L. A. 791.)

*(Supreme Court of California, Dec. 24, 1900.)*

[63 Pac. Rep. 128.]

**Injury to Employee—Contributory Negligence in Riding on Footboard of Engine.\***—Where deceased, a fireman on a switch engine of defendant, while not on duty jumped on the rear footboard of the switch engine, to ride to the roundhouse, and was killed in a collision, and it was against the rules of defendant to ride on the footboard, of which deceased had knowledge, the contributory negligence of deceased barred a recovery for his death.

**Same—Same—Instructions.**—Where deceased was killed in a collision caused by an open switch, while riding on the footboard of a switch engine, instructions on the questions of willful and wanton misconduct on the part of the defendant were improper, as the evidence presented no question of that character.

**Same—Immature Age of Deceased—Instructions.\***—Where deceased, a bright and active boy of 17 years, who had been employed for 2 months as fireman on defendant's switch engine, was killed while riding on the footboard of the engine when not on duty, an instruction that if deceased was a trespasser the jury could take into consideration his youth, and the immature judgment which naturally belongs to youth, in determining his negligence, was erroneous; the evidence presenting no question that deceased was immature or inexperienced.

**Same—Contradictory Instructions.**—Where the court charged that, if deceased was killed through the wanton and willful neglect of the

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\*See notes at end of case.

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defendant, the jury must be satisfied that the accident causing the death was not caused alone by negligence, but that the negligence must have been willful and wanton, to make the defendant liable, and also charged that if defendant failed to give proper signals and keep a proper lookout in order to prevent a collision, and by reason of such negligence, without fault of the deceased, he was killed in a collision, the verdict must be for the plaintiff, the two instructions were directly contradictory and erroneous.

Same—Riding on Footboard of Engine While off Duty—Duty of Railroad.—Where deceased, a fireman on a switch engine, was killed in a collision while riding on the footboard of the engine while not on duty, an instruction that if the servants of defendant in charge of the engine knew that deceased was riding on the footboard, in a dangerous position, and they did not stop and order him off or compel him to get off, but allowed him to remain without objection until the collision occurred, defendant was liable for his death, provided the defendant did not exercise ordinary care to prevent the accident, was erroneous.

Department 1. Appeal from superior court, Kern county; J. W. Mahon, Judge.

Action by John Lemasters against the Southern Pacific Company. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

J. W. Ahern and Walter J. Trask, for appellant.

A. J. Bledsoe, for respondent.

Garoutte, J. This action was brought by a father to recover damages for the death of his son. The deceased was a bright, active boy, nearly 17 years of age. He was a fireman upon a switch engine of defendant, and had been working in that capacity for nearly 2 months. At the time of the accident he was not on duty. The pay car of defendant, to which was attached a switch engine, started to go from the railroad station to the roundhouse. A board is attached respectively to the front and rear of this engine, about a foot above the track. This board is placed there for the use of the yardmen in directing the movements of the engine. As the engine started to the roundhouse, the deceased, in company with three others, jumped upon the rear board; and while standing upon it, and riding towards the roundhouse, the engine, by reason of an open switch, passed to another track and collided with a stationary engine there located. Deceased was killed, being jammed between the engine and the car, and the other three parties were severely injured. If deceased had been a passenger upon the train of defendant, and had located himself in a position of danger similar to that where he here placed himself, it is evident damages could not be recovered for his death. His contributory negligence in placing himself in that position would be a complete bar to a recovery. And we cannot see how plaintiff is in a better position to bring

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this action than he would have been if deceased had been a passenger upon defendant's train. As disclosed by the facts, deceased was either a trespasser or a mere licensee. As a trespasser, defendant owed him no duty; and if he was a mere licensee riding upon the train, even conceding that defendant owed him a duty, still he certainly had no more rights than a passenger situated under the same circumstances. It would be an anomaly to hold that a mere licensee could occupy a position, as to the defendant, more favorable to himself than could the ordinary passenger traveling upon the train. Again, if deceased was a licensee, he was only a licensee to ride upon the train. He was not a licensee to ride upon this board attached to the engine. It was against the rules of defendant for persons to ride upon this board, and deceased was acquainted with that fact. In addition to these circumstances, there is no evidence that the deceased, or anyone else, with the consent of defendant, at this particular time or at any other time, rode upon this board. In this case the doctrine of *Esrey v. Southern Pac. Co.*, 103 Cal. 541, 37 Pac. 500, is invoked,—a case of wanton and willful misconduct upon the part of the defendant. But this is no such case. Here defendant did not know that deceased was upon the board, and, even if it had known it, it did not know that the switch was open. If defendant had known that the switch was open and that deceased was upon the board, and, being possessed of that knowledge, had run the train upon the other track, thereby colliding with the second engine, possibly the doctrine of the case cited could be invoked. *Wilcox v. Railway Co.* (Tex. Civ. App.) 33 S. W. 379, in its facts, is similar to the case at bar, except by the facts of that case it appears that the young man injured was riding on the engine board with the consent of the engineer and other employees. Yet it was there held that, having placed himself in the position of danger, he was barred from recovering damages for injuries received by reason of defendant's negligence. See, also, *Eaton v. Railroad Co.*, 57 N. Y. 382.

Instructions of the court were given to the jury upon the question of willful and wanton misconduct upon the part of defendant. In view of what has been said, the evidence presented no question of that character.

Again, the court instructed the jury that, if deceased was a trespasser, the jury could take into consideration his youth, and the immature judgment which naturally belongs to youth, etc. When we consider that the deceased was nearly 17 years of age,—a bright, active boy who had been for 2 months working as a fireman upon the identical engine upon which he was riding at the time of the accident,—we feel assured there is no place to be found in the case where instructions were appropriate, which deal with this question of the immature judgment of childhood.

## Notes

The court gave the jury the following instruction at the instance of defendant: "In this case the plaintiff claims that his son, Charles Lemasters, was killed \* \* \* through wanton and willful neglect of the defendant; and, before you can find a verdict against the defendant, you must be satisfied that the accident causing the death was not caused alone by negligence, but that negligence must have been willful and wanton." The following instruction was given at the request of plaintiff, in speaking as to the duty of the defendant to give signals and keep a proper lookout in order to prevent a collision: "And if you find from the evidence that the servants of defendant failed therein, and by reason of their negligence, and without the fault of the deceased, Charley Lemasters, he was killed in a collision as alleged in the complaint, it will be your duty to find a verdict for the plaintiff." These two instructions are directly contradictory. The court also gave the jury the following instruction: "And if the servants of defendant in charge of and operating said engine and train, knowing that the deceased, Charley Lemasters, was riding on the foot-board of said switch engine, in a dangerous position, yet did not stop the train and order him off, or compel him to get off, but allowed him to remain where he was, without objection, until the collision occurred, then the defendant is liable for his death, and your verdict must be for the plaintiff, provided you find the defendant did not exercise ordinary care to prevent the accident." If this instruction be sound law, then the ordinary tramp riding upon a brakebeam could recover damages for injuries received in a collision occasioned by the negligence of defendant, if the defendant knew the tramp was riding. The instruction does not contain a sound exposition of law. For the foregoing reasons, the judgment and order are reversed and the cause remanded.

We concur: Harrison, J.; Van Dyke, J.

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NOTES.

**Injuries to Employees—Riding on Locomotive in Violation of Rules as Contributory Negligence.**—See *Chattanooga S. R. Co. v. Myers* (Ga.), 19 Am. & Eng. R. Cas., N. S., 776, and *notes*, 777 *et seq.*

**Same—Violation of Rules as Contributory Negligence.**—See *Galveston, H. & S. A. Ry. Co. v. Adams* (Tex.), *ante*, and *notes*.

**Injury to Employee after Working Hours.**—See *Sullivan v. New York, etc., R. Co.* (Conn.), 20 Am. & Eng. R. Cas., N. S., 108, and *note*, 117.

**Contributory Negligence of Minors.**—As to the degree of care required of minors for their own protection, see *notes*, 19 Am. & Eng. R. Cas., N. S., 355 *et seq.*



## KILPATRICK

v.

## GRAND TRUNK RY. CO.

*(Supreme Court of Vermont, March 12, 1900.)*

[47 Atl. 827.]

**Injury to Employee—Negligence in Failing to Perform Statutory Duty—Contributory Negligence—Burden of Proof.**—V. S. § 3886, provides that no company shall run cars of its own with ladders on the side of the car, but that the ladders shall be on the ends of the car; and section 3887 declares that a railroad corporation not complying with such requirement shall be liable for the damages and injuries to employees resulting from such neglect. Plaintiff, a brakeman for defendant, was injured while attempting after dark to board a freight train running eight miles an hour by catching on the ladder on the side of one of defendant's cars. *Held*, that an instruction that the question of contributory negligence was not in the case was erroneous, since defendant's neglect to perform its statutory duty did not relieve plaintiff from proving that his own negligence did not contribute to his injuries.

**Same—Boarding Moving Car—Contributory Negligence as Matter of Law.\***—Where plaintiff attempted after dark, and with a lantern in his hand, to board a freight train running at eight miles an hour by catching the ladder on the side of the car, he was negligent, as a matter of law, and cannot recover for his injuries.

Exceptions from Orleans county court; Thompson, Judge.

Action by Cornelius Kilpatrick against the Grand Trunk Railway Company. From a judgment in favor of plaintiff, defendant brings exceptions. Reversed.

At the close of the evidence the defendant moved the court to direct a verdict in its favor. This motion was overruled. The court instructed the jury that the effect of V. S. §§ 3886, 3887, was to exempt the plaintiff from the risks of his employment arising from the use of a ladder on the side of the car in question. The court submitted the case to the jury with instructions to find a general verdict, without reference to the question of contributory negligence. A special verdict was taken on the question, "Did the negligence to the plaintiff contribute to the accident causing his injury?" To this question the jury answered, "No."

Argued before Taft, C. J., and Rowell, Tyler, Munson, Start, and Watson, JJ.

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\*See notes at end of case.

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Young & Young and E. A. Cook, for plaintiff.

C. A. Hight, L. L. Hight, and Chamberlin & Rich, for defendant.

Taft, C. J. 1. The injury to the plaintiff was caused by his attempting to board a moving freight train by means of a ladder placed upon the side of a car. V. S. § 3886, reads as follows: "No railroad company shall run cars of its own with ladders or steps to the top of the same, on the sides of its cars, but said ladders or steps shall be on the ends or inside of the cars." Section 3887 provides that a railroad corporation not complying with the requirements of section 3886 shall be liable for the damages and injuries to employees on its roads resulting from such neglect. By force of the statute the defendant is liable for any injury to one of its employees resulting from its neglect in not placing a ladder or steps upon the end or inside of the car. The car in question was one belonging to the defendant, and it was its duty, which it failed to perform, to equip it as provided in the section referred to. The plaintiff, therefore, is entitled to recover, unless barred by the fact that he assumed the obvious dangers of the risk, or is chargeable with contributory negligence. As we dispose of the case upon the question of contributory negligence, we do not consider whether the plaintiff is barred from recovering by having assumed the obvious dangers of his employment. The point in respect to the special finding is not insisted upon by the defendant.

2. Did the court err in ruling that the question of contributory negligence was not in the case? It is urged by the plaintiff that the case is analogous to one arising under V. S. §§ 3871, 3877, relating to cattle guards, which provide that a corporation owning or operating a railroad shall construct and maintain cattle guards at all farm and railroad crossings, and fences along the right of way, sufficient to prevent cattle and animals from getting on the railroad, and making the corporation liable for the damages done by its agents or engines to cattle, horses, or other animals thereon, if occasioned by want of such fences and cattle guards. It was long since held under this statute that a railroad company was liable when a horse which was killed was an estray, and had escaped from the pasture through the negligence and carelessness of its owner. There are several cases in the late volumes of the Reports which hold the same doctrine. These cases can well be put upon the ground that the negligence of the plaintiff in permitting his animals to escape, stray away, and pass upon the railroad track was remote, and not proximate. If the negligence of the plaintiff consisted in his negligently driving cattle upon the track, at the time of the accident, it might well be claimed that such negligence was proximate, not remote, and that his neglect would bar a recovery. When

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the negligence of the plaintiff did not occur at the time of the accident, but was prior thereto, and consisted in permitting his animals to stray away, it is not mutual with that of the defendant, and was not one of the proximate causes of the accident; for, in the use of the words "proximate cause," negligence occurring at the time the injury happened is meant. The case, in principle, is analogous to the one which formerly arose under the provisions of our early statutes, which enacted that "if any special damage shall happen to any person, his team, carriage or other property, by means of the insufficiency or want of repairs of any highway or bridge in any town, which such town is liable to keep in repair, the person sustaining such damage shall have the right to recover the same," etc. In these cases it has been universally held that if the plaintiff is guilty of contributory negligence, as one of the proximate causes of the accident, if his negligence contributes to his injury to any extent he is not entitled to recover. But in such highway cases it was held that when the plaintiff's negligence consisted in taking a road constructed to avoid the dangerous place, which caused the accident, the plaintiff was not barred from a recovery, for the reason that his negligence was remote, not proximate. *Templeton v. Town of Montpelier*, 56 Vt. 328. The question of proximate and remote cause arose in *Davis v. Railroad Co.*, 66 Vt. 290, 29 Atl. 313, in which the defendant was negligent in not forwarding grain in its elevators at Ogdensburg. The elevators burning without fault on the part of the forwarders, the defendant was adjudged not liable, for that the fire was the proximate, and the delay to forward only the remote, cause of the damage. "That a person guilty of contributory negligence should not recover, even when the injury arises from neglect to observe a statutory duty, is not only reasonable, but clear law; for in such a case the plaintiff has failed to establish the proposition on which alone he is entitled to recover damages,—that the injury happened through the defendant's negligence." *Bevin, Neg.* (2d Ed.) 765. To entitle the plaintiff to recover the cause of the injury must be the negligence of the defendant, and that only. He is entitled to no relief if the injuries resulted from negligence of his own combined with that of the defendant. The rule is the same whether the negligence is by the common law or statutory. The negligence of the statutory duty may involve the person guilty thereof in penalties, yet the law will not allow the injured person to recover, because he himself contributes to the injury.

3. Should the question of contributory negligence have been submitted to the jury, or was it one of law? The rule with us is: "When the standard of negligence is not prescribed, and there is a combination of facts and circumstances relied upon to show negligence, the question becomes one of law only when those facts and circumstances are so decisive one way or the other as to leave no reasonable doubt about it,—no room for oppos-

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ing inferences. This is clearly shown by the adjudged cases." *Worthington v. Railroad Co.*, 64 Vt. 107, 23 Atl. 590, 15 L. R. A. 326; *Magoon v. Railroad Co.*, 67 Vt. 177, 31 Atl. 156. Can it be said in this case that the facts and circumstances are so decisive as to leave no reasonable doubt about it,—no room for opposing inferences? The plaintiff attempted to climb upon a moving car in a train which was running faster, as he says, than he could run,—moving at the rate of eight or nine miles an hour. It was in the evening, dark. He had a lantern in his hand, and attempted to board the train by getting hold of the ladder and passing upon it to the top of the car. In his first attempt he failed, tried again, and was injured before he could pass up the ladder to the top of the car. There can be but one inference from the testimony in the case, and that is that the plaintiff was guilty of negligence in attempting, in the nighttime, with a lantern in his hand, to board a freight train running as rapidly as he says this was,—that it must be held to be negligent for any person so to do. The plaintiff, being thus negligent, as matter of law, was not entitled to recover; and the ruling of the court, therefore, that the question of contributory negligence was not in the case, was error. Judgment reversed and cause remanded.

## NOTES.

**WHETHER THERE CAN BE RECOVERY FOR INJURIES TO EMPLOYEES CAUSED BY ATTEMPTS TO BOARD MOVING CARS AND ENGINES.**

**Cars—Obedience to Orders—Not Contributory Negligence Per Se.**—It is not contributory negligence *per se* for a track hand, in obedience to an order from his section boss, to attempt to board a train of flat cars moving up grade at the rate of three or four miles an hour. *Chattanooga Electric Ry. Co. v. Lawson et al.* (Tenn.), 12 Am. & Eng. R. Cas., N. S., 669. And see generally, *note* at end of this case, p. 672 *et seq.*

**Same—Same—Not Contributory Negligence.**—It is not negligence for a section hand to attempt to board a moving train when required to do so by order of the conductor and others in charge. *Ragburn v. Central Iowa R. Co.* (Iowa), 35 N. W. Rep. 606.

**Same—Acting under Orders in Emergency—Question for Jury.**—A brakeman, acting under the orders of a conductor, and in an emergency which gave him no time for reflection, attempted to catch a fast-moving freight car. It was in the nighttime and his lantern had gone out, and the ground was uneven. His foot slipped and he was injured. *Held*, that the finding of the jury that there was no contributory negligence would not be disturbed. *Fox v. Chicago, St. P. & K. C. R. Co.*, 53 Am. & Eng. R. Cas. 430, 86 Iowa 368, 53 N. W. Rep. 259.

**Same—Negligence and Contributory Negligence—Custom.**—A servant of a railroad company cannot recover in a suit against the company for injuries received while recklessly attempting to board a moving train, although it is shown that the train was improperly

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equipped and that some of its appliances were defective. And the fact that he was in the habit of boarding moving trains, or that he had been seen to do so on previous occasions with impunity, will not avail him. *Dowell v. Vicksburg & M. R. Co.*, 18 Am. & Eng. R. Cas. 42, 61 Miss. 519; *Chambers v. Western N. C. R. Co.*, 91 N. Car. 471; *Timmons v. Central Ohio R. Co.*, 6 Ohio St. 105.

**Same—Attempting to Prevent Collision—Not Contributory Negligence Per Se.**—In an action for injuries to plaintiff's decedent, causing his death, the complaint alleges that it was the duty of the deceased, as an employee of the defendant company, to take care of its cars in a certain yard; and it then alleges, in substance, that, seeing an unattended car upon a track in such yard, approaching another car so that it would collide with the latter unless it was arrested, the deceased, in order to prevent such collision, and "without fault or negligence on his part," undertook to climb upon the top of the approaching car, by an outside ladder thereon; and that while he was climbing the two cars collided, causing the injury. *Held*, on demurrer, that the court cannot on these averments determine that the deceased was guilty of negligence *per se*. *Kelley v. Chicago, Milwaukee & St. Paul Railway Company*, 50 Wis. 381, 2 Am. & Eng. R. Cas. 65.

**Same—Conductor Killed by Low Bridge—Standing on Car in Violation of Rule.**—The mere fact alone that the injuries received by an employee of a railroad company were inflicted while such employee was acting in disobedience of known rules, will not relieve the master of liability; but if the violation in whole or in part of such rules is the cause of the injury, it will prevent a recovery by the employee. *San Antonio & A. P. C. R. Co. v. Wallace* (Tex.), 44 Am. & Eng. R. Cas. 564.

**Engine—Not Necessarily Contributory Negligence.**—It is not necessarily negligent for a switchman accustomed to the work to step upon a properly constructed footboard of a slowly moving engine, especially where there is no rule forbidding it. *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 Mo. 205, 21 S. W. Rep. 503.

**Same—Gross Contributory Negligence.**—A night switchman is guilty of gross negligence in attempting to get on a moving engine by stepping on the front footboard in violation of an express rule of the company, and cannot recover for injuries received. *Lake Shore & M. S. R. Co. v. Roy*, 5 Ill. App. 82.

**Same—With Knowledge of Defective Step.**—Where a flagman injured because of a defective step, testified that he knew the condition of the step and the difficulty of getting upon it beforehand, and yet attempted to board the engine when in motion, by means of such step, in the nighttime, encumbered with two lanterns and knowing he had the right and power to bring the engine to a stop, it was error not to instruct the jury that he was guilty of contributory negligence, and could not recover. *New York, L. E. & W. R. Co. v. Lyons*, 119 Pa. St. 324, 11 Cent. Rep. 834, 13 Atl. Rep. 205, W. N. C. 277.

**Same—Patent Defects—Gross Contributory Negligence.**—A., in the employ of a railroad company as yardman, while engaged in his occupation as such, attempted to board the switch-engine, with which he was working, by standing in the middle of the track and stepping on the rear footboard of said engine, which was approaching him, tender first, at a

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rate of from one to three miles an hour, but, in the attempt, fell, was run over by the engine, and died from the effect of his injuries. The hand-rail on the rear end of the engine, which was approaching the deceased, had been torn off the previous night, and had not been replaced, and the rear footboard of the engine in question was partly broken at one end. *Held*, the act of so attempting to board the engine was clearly a case of gross contributory negligence on the part of the deceased, and the verdict should be set aside. *Cunningham v. Chicago, M. & St. P. R. Co. (C. C.)*, 12 Am. & Eng. R. Cas. 217.

**Same—Although Step to Engine Cab Is Defective, if Employee Is Guilty of Contributory Negligence in Attempting to Get upon It While the Engine Is in Motion, He Cannot Recover.**—If the rear right-hand step on the cab of a switch-engine is defective, and a person employed by the railroad company in discharging the duties of a helper to a hostler in charge of the engine attempts to get upon such step when the engine is in motion, and when the step is partially obscured by escaping steam and dust blown up thereby; when he had no duty to perform that required him to get on at such a place, and when the rear footboard was a safer place to get upon the engine in motion; when he deliberately chose to get upon the side step without any directions so to do; when he had adopted the plan of getting on, and riding on the side; when he was afraid to attempt to get upon the front footboard, because the engine was going too fast, and in his attempt to get upon the side step his foot slipped off, rested on the rail, and one of the wheels of the engine so mashed and mangled it as to compel amputation of all that part of the foot in front of the ankle joint,—he cannot recover for such injury on account of the defective condition of the step. *Union Pac. R. Co. v. Estes*, 37 Kan. 715.

**Same—Mounting Pilot—Obedience to Orders—Negligence and Contributory Negligence.**—A brakeman cannot recover for injuries received in attempting to get on the pilot of a moving engine, by orders of his superior, by reason of his clothes catching in the splinters of a worn rail, though the company may have been negligent in not repairing the track. *Cornwall v. Charlotte, C. & A. R. Co.*, 97 N. Car. 11, 2 S. E. Rep. 659.

**Same—Contributory Negligence in Selecting Unsafe Place.**—There is a want of ordinary care in the voluntary attempt of an employee discharging the duties of a helper to a hostler to get upon a switch engine in motion by the step at the rear right-hand side of the cab of the engine, when he had no duty to perform in the cab of the engine, and when a safer place for him to get upon the engine would be the rear footboard, which was used for this purpose by that class to which he belonged, and when the danger of the attempt to get upon the side step is increased by the step being obscured to some extent by the escaping of steam from the cylinder cocks of the engine, and the dust blown up thereby. *Union Pac. R. Co. v. Estes*, 37 Kan. 715, 16 Pac. Rep. 131.

**Same—Mounting Tender at Wrong Place.**—If a fireman, contrary to the orders of the company, attempted to mount the tender at the end approaching him, and did not wait until the cab step came opposite to

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him, where he could with safety have entered at the proper place, he cannot recover for injuries caused by a hand-hold upon the tender giving way by reason of its defective fastening. *Murray v. Gulf, Colorado & Santa Fe R. Co.* (Tex.), 38 Am. & Eng. R. Cas. 177.

Same—Getting on in Front.—Though the board was slanting, the company would not be liable for the switchman's injury if he negligently got in front of the moving engine and without care attempted to get on the footboard and slipped and fell. *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 Mo. 205, 21 S. W. Rep. 503.

## GALVESTON H. & S. A. RY. CO.

v.

NASS *et al.*

(*Supreme Court of Texas, Dec. 17, 1900.*)

[59 S. W. 870.]

**Negligence—Railroads—Connecting Carriers—Injury to Employee—Defective Car—Failure to Inspect—Liability of Connecting Carrier.\*—**Where a railroad employee recovered judgment against the company for an injury due to its failure to inspect a foreign car which the connecting carrier had delivered to defendant without inspection, the jury, by its verdict, found that defendant's negligence was the proximate cause of the injury; and hence defendant was not entitled to judgment over against the connecting carrier, though it was also guilty of negligence, since to allow such recovery would be to authorize a recovery by a person found to be guilty of contributory negligence.

Error to court of civil appeals of Fourth supreme judicial district.

Action by J. H. Nass against the Galveston, Harrisburg & San Antonio Railway Company and cross petition by defendant against the International & Great Northern Railway Company for judgment over. A judgment in plaintiff's favor against defendant and over against the International & Great Northern Railway Company was affirmed as to defendant, and reversed as to the cross defendant, by the court of civil appeals (57 S. W. 910), and defendant brings error. Affirmed.

\*As to the master's duty to inspect foreign cars, see *Louisville & N. R. Co. v. Veach* (Ky.), 11 Am. & Eng. R. Cas., N. S., 24, and *foot-note*; *Union Stock-Yards Co. v. Goodwin* (Neb.), 12 Am. & Eng. R. Cas., N. S., 502; *Leak v. Carolina Cent. R. Co.* (N. Car.), 14 Am. & Eng. R. Cas., N. S., 739; *St. Louis, etc., Ry. Co. v. Brown* (Ark.), 16 Am. & Eng. R. Cas., N. S., 441.

Galveston, etc., Ry. Co. v. Nass

Upson, Newton & Ward, for plaintiff in error.

J. R. Norton, Perry J. Lewis, and H. C. Carter, for defendant in error Nass.

N. A. Stedman and Denman, Franklin, Cobbs & McGown, for defendant in error International & G. N. Ry. Co.

Brown, J. J. H. Nass sued the Galveston, Harrisburg & San Antonio Railway Company for damages arising out of personal injuries received by him while in the employ of the company as brakeman on its train, which injuries occurred through the braking of a handhold upon the car on which he was working. The car belonged to the International & Great Northern Railway Company, a connecting carrier, which had delivered the car to the Galveston, Harrisburg & San Antonio Railway Company to be by it delivered at the point of destination on its line. The Galveston, Harrisburg & San Antonio Railway Company pleaded over against the International & Great Northern Railway Company, making it a party defendant, and asking for judgment against it for whatever amount Nass might recover in that suit. From the conclusions of fact filed by the court of civil appeals, we make the following statement: The car was the property of the International & Great Northern Railway Company, and was transferred and delivered to the Galveston, Harrisburg & San Antonio Railway Company at San Antonio, to be by the latter company transported on its line to its destination. The Galveston, Harrisburg & San Antonio Railway Company made inspection of the car at the time of receiving it, but the inspection was not properly and carefully done. When Nass was attempting to climb upon the car in the discharge of his duty, a handhold broke loose, the wood to which it was attached being rotten, and caused him to fall upon another track, striking the small of his back on a rail, thereby inflicting a serious injury. The inspector of the International & Great Northern Railway Company had, on the same day, and before the delivery of the car to its connecting carrier, inspected it. The defect was such as could have been discovered by a careful inspection. There was no agreement between the two companies which would require the delivering company to respond to the other in respect to unsafe cars that might be delivered. No partnership existed between the two roads in reference to the hauling of cars. Upon the trial the judge instructed the jury that, in case they should find any sum in favor of the plaintiff against the Galveston, Harrisburg & San Antonio Railway Company, they would also find in favor of that company the same sum against the International & Great Northern Railway Company. The jury returned a verdict in favor of the plaintiff against the Galveston, Harrisburg & San Antonio Railway Company and in favor of that company against the International & Great Northern Railway Company for the same sum. The court of civil appeals (57



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S. W. 910) affirmed the judgment as between the Galveston, Harrisburg & San Antonio Railway Company and J. H. Nass, and reversed the judgment of the district court as between the two railroad companies, entering judgment that the International & Great Northern Railway Company go hence without day.

We find no error in this judgment as between the plaintiff in error and the defendant in error Nass, and the judgment between them will be affirmed. To save frequent repetition of the names of the different corporations, the Galveston, Harrisburg & San Antonio Railway Company will be designated as plaintiff, and the International & Great Northern Railway Company as defendant. The plaintiff claims that the defendant is liable to it for the amount that was adjudged against it in favor of Nass because the defendant owned the car upon which Nass was engaged at the time he was injured, and had delivered it to the plaintiff for the purpose of being transported on its line. The substance of the claim is that in delivering the car the International & Great Northern Railway Company owed to the plaintiff and to its employees the duty to use ordinary care to see that it was in a reasonably safe condition for use by plaintiff's employees, and that the defendant negligently failed to perform that duty. It is claimed that Nass had the right to recover against either or both of the railroad companies, and that the plaintiff company, having suffered a recovery on account of the injury, has the right to be indemnified by the defendant company. If it were necessary to determine the question of liability of the defendant to Nass, we are not prepared to say that the International & Great Northern Railway Company would be liable to him. The authorities upon that question are quite conflicting, but we need neither to discuss nor to decide it; for, if it be admitted that Nass might have recovered against either or both of the railroad companies, still the question arises, can the plaintiff, after having suffered a recovery by an injured employee, enforce indemnity against the defendant, whose car he was using at the time of the injury? Assuming that defendant owed the duty to Nass to inspect the car before it was delivered, and to exercise ordinary care to see that it was reasonably safe for use, it was equally the duty of the plaintiff, for the protection of its own employees, to exercise like degree of care by inspecting that car before it was used; and for a failure to do so it was liable as if it had been its own property. *Railway Co. v. Kernan*, 78 Tex. 297, 14 S. W. 668, 9 L. R. A. 703. If the plaintiff was not guilty of negligence in receiving and placing the car in the hands of its employees for use, it was not liable to Nass for his injury, and, if not liable to him, it could not recover indemnity against the defendant railroad company, although the latter might be liable to Nass. On the other hand, if the plaintiff was guilty of negligence in failing to perform its duty, which caused injury to Nass, for which a

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judgment was recovered against it, its negligence was, as between it and Nass, the proximate cause of the injury, otherwise he could not have recovered against it; and, if the negligence of the plaintiff was the proximate cause of the injury, then, so far as the defendant is concerned, it may properly be said that the plaintiff contributed to the injury for which it seeks to recover. This case is analogous to that class in which it is held that where a parent negligently permits a young child to go into danger, whereby it is injured, no recovery can be had by the parent, although the child may recover for its injuries. The very foundation principle of public policy that denies recovery in such cases becomes more sternly imperative in forbidding it on the part of a railroad company, which is charged with the inspection of foreign cars before using them, in order to protect its own employees; because, if that were allowed, the negligent party would be offered an inducement to relax its vigilance in the protection of those who are largely dependent upon it for their safety in the performance of hazardous duties. The court of civil appeals finds that both companies were guilty of negligence, which shows that plaintiff contributed to the injury, which bars its right of action, if it otherwise could maintain it. We are of opinion that there is no error in the judgment of the court of civil appeals in holding that the International & Great Northern Railway Company was not liable to the Galveston, Harrisburg & San Antonio Railway Company upon its plea over in this case, and the judgment of the court of civil appeals is therefore affirmed.

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McDONALD

v.

ILLINOIS CENT. R. CO. *et al.**(Supreme Court of Illinois, Oct. 19, 1900.)*

[58 N. E. 463.]

**Master and Servant—Action for Blacklisting—Sufficiency of Declaration.\***—In an action by a railroad employee against his former employer and other companies from which he had sought employment for damages for blacklisting, plaintiff alleged that defendants entered into a conspiracy to furnish each other information as to all their former employees who had left their service during the railway strike in 1894, and that such an employee would not be re-employed by them "without a release and consent from the railway company by which such employee was last employed, such release and consent being commonly called by rail-

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\*See *Hundley v. Louisville & N. R. Co.* (Ky.), 12 Am. & Eng. R. Cas., N. S., 749, and notes, 753 *et seq.*

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road men a 'clearance'"; that he was engaged in the strike mentioned; and that his former employer refused to give him such "a release and consent as would enable him to obtain employment." Held, that a demurrer was properly sustained, the declaration not charging that defendants agreed not to employ a striker without consent of his former employer, but that they conspired not to do so unless he had the ordinary "clearance card," and also failing to allege that in refusing to give plaintiff such a clearance "as would enable him to obtain employment" his former employer misrepresented any fact or refused to disclose the truth concerning him.

**Same—"Clearance Cards"—Judicial Notice.\***—The court will take judicial notice of the manner in which ordinary railroad business is conducted, and that a "clearance" or "clearance card," as the term is commonly used by railroad men, is a letter given an employee, on quitting the service of the company, showing a voluntary quittance or the cause of his discharge, his length of service, capacity, etc., and that it is not necessarily a letter of recommendation, such as would tend to secure him further employment.

MAGRUDER, J., dissenting.

Error to appellate court, First district.

Action by William F. McDonald against the Illinois Central Railroad Company and others to recover damages for black-listing. From a judgment of the appellate court, First district (83 Ill. App. 463), affirming a judgment in favor of defendants entered on a demurrer to the declaration, plaintiff brings error. Affirmed.

The circuit court of Cook county sustained a demurrer to a declaration filed herein by plaintiff in error, August 7, 1896. Under an order granting leave to file an amended declaration, plaintiff in error, on the 15th day of January, 1898, filed the following declaration: "William F. McDonald, plaintiff, by William J. Strong, his attorney, for his amended declaration, by leave of court, complains of the Illinois Central Railroad Company (a corporation) and the Chicago & Northwestern Railway Company (a corporation) of a plea of trespass on the case, for that whereas, heretofore, to wit, on the 26th day of June, 1894, the plaintiff was, and still is, a citizen of the state of Illinois, living in the city of Chicago, county of Cook, in said state, and was by occupation a skilled railroad man, and had for about five years theretofore been employed by the defendant the Illinois Central Railroad Company as a switchman and conductor, and the plaintiff was, and still is, by reason of his long experience, skill, and good habits, a safe and competent railroad operator, well qualified for and adapted to follow the lucrative calling of switchman and conductor. And plaintiff further avers that prior to the 6th day of August, 1894, and up to and includ-

\*See generally, Knowlton v. New York, N. H. & H. R. Co. (Conn.), 16 Am. & Eng. R. Cas., N. S., 573, and extensive note, 580 *et seq.*

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ing, to wit, the 26th day of June, 1894, he was in the employ of the defendant the Illinois Central Railroad Company as a switchman and conductor, which said employment was a lucrative and profitable one for the plaintiff, and which he, by reason of his long experience, and by reason of qualifications which he possessed, had reason and cause to believe would continue to be one of great gain and profit to him; that on or about the 26th day of June, 1894, he voluntarily left the service of the defendant the Illinois Central Railroad Company. Plaintiff further states that before the said 6th day of August, 1894, and before the acts complained of herein, the defendants entered into a conspiracy, agreement, and understanding with certain other railroad companies having lines of railway running into the said city of Chicago (to wit, all the railroad companies having lines running into said city of Chicago), namely, the Atchison, Topeka & Santa Fe; the Baltimore & Ohio; Chicago & Erie; Chicago & Grand Trunk; Chicago & Western Indiana; Chicago, Burlington & Quincy; Chicago Great Western; Chicago, Milwaukee & St. Paul; Chicago, Rock Island & Pacific; Cleveland, Cincinnati, Chicago & St. Louis; Lake Shore & Michigan Southern; Louisville, New Albany & Chicago; Michigan Central; New York, Chicago & St. Louis; Pennsylvania; Wisconsin Central; Wabash; Union Stock Yard & Transit Company; Calumet & Blue Island; Belt Railway Company; Pittsburg, Cincinnati, Chicago & St. Louis; Pittsburg, Ft. Wayne & Chicago; Chicago & Eastern Illinois; and Chicago & Southwestern Railway Company,—that they, the said railroad companies, would furnish, each to the other, information as to all their employees who had committed offenses, or who were charged with having committed offenses, and also as to all their employees who had left their service during the strike which commenced on or about June 26, 1894, and ended on or about August 6, 1894, commonly known as the 'A. R. U.' or 'American Railway Union' strike, and as to all their employees who were members of the A. R. U., or American Railway Union, and that such employees of any and all said companies would not be employed by any of said companies without a release and consent from the railway company by which any such employee was last employed, such release and consent being commonly called by railroad men a 'clearance'; which said conspiracy and agreement, so entered into as aforesaid, was a conspiracy and agreement to blacklist and boycott such employees, the object and purpose of which conspiracy and agreement was to maliciously and wantonly interfere with such employees who had so previously terminated their employment with, or been discharged from the employment of, either of said railroad companies, in and about obtaining employment with any other of said railroad companies in the city of Chicago. Plaintiff further alleges that said conspiracy and agreement, so entered into between the railroad companies

having lines running into Chicago, was, prior to the commencement of this action, entered into by all the railroad companies operating railroads in the United States, which said conspiracy and agreement is still in force among the railroad companies having lines of railway running into the city of Chicago, aforesaid, as well as all other railway companies operating railroads in the United States, including the Toledo & Ohio Central Railroad Company, hereinafter mentioned. Plaintiff says that he left the service of the defendant the Illinois Central Railroad Company during the strike commonly known as the 'A. R. U.' or 'American Railway Union' strike, which began on or about the 26th day of June, 1894, and ended on or about the 6th day of August, 1894, and after he so left the employment of the defendant the Illinois Central Railroad Company, and before the commencement of this suit, the said defendant the Illinois Central Railroad Company did willfully and maliciously, and in pursuance of said conspiracy, agreement, and understanding above set forth, and with the intent willfully and maliciously to prevent plaintiff from securing employment, refuse to give plaintiff such release and consent as would enable him to obtain employment in the railroad business, and with the intent willfully and maliciously to interfere with the plaintiff in his endeavor to secure employment in the railroad business, and to prevent him from securing such employment, cause to be made known to said other railroad companies, including the Toledo & Ohio Central Railroad Company, that he, the plaintiff, had quit the service of it, the said defendant the Illinois Central Railroad Company, during said A. R. U. strike; that such information aforesaid, so made known by the defendant the Illinois Central Railroad Company, was given and made known by the defendant the Illinois Central Railroad Company, to said other railroad companies with the willful and malicious intent of preventing the plaintiff from securing employment in the railroad business, for which he was well qualified, and the defendant the Illinois Central Railroad Company thereby requested the enforcement of said above-described preconcerted conspiracy and agreement so entered into with said various other railroad companies that said various other railroad companies should not employ the plaintiff in any branch of their service, for which he, the plaintiff, was well qualified, without the plaintiff first obtained the consent of the said defendant the Illinois Central Railroad Company, which consent the defendant the Illinois Central Railroad Company (though requested by the plaintiff so to do) refused, and still refuses, to give; and the plaintiff says that in consequence thereof, and for no other cause or causes, he has been denied the right of engaging in his usual occupation as a skilled railroad man, and has been denied employment by the defendants the Chicago & Northwestern Railway Company, and by the Toledo & Ohio Central Railroad Com-

pany, which railroad companies were parties to said conspiracy, and to which railroad companies he has applied for employment since leaving the service of the Illinois Central Railroad Company and before the commencement of this suit, and was discharged from the employment of the defendants the Chicago & Northwestern Railway Company and the Toledo & Ohio Central Railroad Company, from which companies he had secured employment after leaving the service of the Illinois Central Railroad Company, and before the commencement of this suit, and thereupon and thereby the plaintiff was denied employment by said Chicago & Northwestern Railway Company and by said Toledo & Ohio Central Railroad Company, and though he has assiduously applied for work to a great number of railroad companies in the United States, to wit, all the railroad companies in the United States operating railroads, he has, by reason of the willful and malicious conduct and agreement of the defendants and other railroad companies heretofore set forth, and for no other cause or causes, been denied the right of contracting for and obtaining employment with any of said railroad companies, and has been prevented from obtaining employment, and has been prevented from supporting himself by his trade and occupation and by his free labor, and prevented from supporting those dependent upon him for the necessities of life, and has suffered great mental anguish, and has lost divers great gains and profits which he might and would otherwise have acquired, and is otherwise damaged and injured by the said willful, malicious, and illegal acts of the defendants. And the plaintiff says that the defendants have, from the 6th day of August, 1894, hitherto, continued this willful, malicious, and illegal interference with this plaintiff in and about procuring employment, and that he is now prevented thereby from obtaining employment as aforesaid, and has lost great emoluments and profits which he might and otherwise would have acquired from his trade and occupation as a skilled railroad man, and the plaintiff, being inexperienced in other kinds of labor, cannot obtain employment except that of a lower class or degree, and not as profitable to the plaintiff as employment in his trade and occupation as a skilled railroad man, to his damage in the sum of \$50,000," etc. The court sustained a general demurrer to this declaration. The plaintiff in error abided his pleading, and judgment was entered accordingly. The record was brought into the appellate court for the First district by writ of error, and the judgment of the circuit court was there affirmed. This is a writ of error to bring the record into review in this court.

William J. Strong, for plaintiff in error.

Sidney F. Andrews, for defendants in error.

Boggs, C. J. (after stating the facts). Counsel for plaintiff in error, in support of his insistence that the circuit court erred

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in holding the declaration did not state a cause of action, says: "The question presented by the declaration and demurrer (when shorn of legal phraseology) is simply this: It is lawful for all the employers in any line of industry to combine and agree that they will not hire any of each other's employees who have left the service of any one of them, unless the employee whose service he has left gives his consent that such employee may be employed? Or, to put it in another form: Is it lawful for all the employers in any line of industry to combine and conspire together to punish a man who leaves their service during a strike by refusing him employment, and thus preventing him from securing employment at his trade, unless his former master emancipates him by giving his consent to his employment?"

We do not think the question in either of its forms was presented to the trial judge by the pleadings. The allegation of the declaration is: "Said defendant railroad companies [defendants in error and other railroad corporations named therein] entered into a conspiracy, agreement, and understanding that they, the said railroad companies, would furnish each to the other information as to all their employees who had committed offenses, or who were charged with having committed offenses, and also as to all their employees who had left their service during the strike which commenced on or about June 26, 1894, and ended on or about August 6, 1894, commonly known as the 'A. R. U.' or 'American Railway Union' strike, and as to all their employees who were members of the A. R. U., or American Railway Union, and that such employees of any and all said companies would not be employed by any of said companies without a release and consent from the railway company by which any such employee was last employed, such release and consent being commonly called by railroad men a 'clearance.'" The meaning of the averment is equivocal. Counsel for plaintiff in error, ignoring a portion of the language, construes the declaration to charge that said defendant corporations agreed that former employees of either company should be required to have an instrument expressing the consent of the former employer to the subsequent employment by another company. That portion of the averment, alone considered, would as well bear the other construction: that the agreement was that such employee should show he had been released from his former employment or had quit with the consent of his employer. But the averment in its entirety is to be resorted to to ascertain the true meaning of the instrument denominated a "release and consent," and, if two or more meanings present themselves, that which is most unfavorable to the pleader is to be adopted. 4 Enc. Pl. & Prac. 759. The pleader, in obedience, as we must assume, to his duty to state issuable facts, distinctly and definitely declares the "release and consent" referred to to be that which is commonly known as, and called among railroad employees, a

Master and  
Servant—Action  
for Blacklisting—  
Sufficiency of  
Declaration.

"clearance." The trial court then properly held the averment of the declaration to mean that the "release and consent" instrument referred to in the declaration was the ordinary clearance or clearance card in common use among railroad corporations and their employees.

This court, in *Railway Co. v. Jenkins*, 174 Ill. 398, 51 N. E. 811, speaking of the instrument known as, and called in railroad circles, a "clearance" or "clearance card," said (page

401, 174 Ill., and page 812, 51 N. E.): "A distinction is to be made between what is known, in terms, as a 'clearance card' and a 'letter of recommendation.' This distinction is apparent, not only from the evidence in this case, but also from the knowledge which courts have of the general conduct and management of railroad business and affairs. It is the duty of courts to take, and they will take, judicial notice of the general business affairs of life, and of the manner in which ordinary railroad business is conducted, and of the everyday practical operation of them. *Slater v. Jewett*, 5 Am. Eng. Ry. Cas. 515; *Smith v. Potter* (Mich.) 9 N. W. 273. From the evidence produced on this question, and from this judicial notice which we take of the ordinary general management of railroads, it is apparent that what is known as a 'clearance card' is simply a letter,—be it good, bad, or indifferent,—given to an employee at the time of his discharge or end of service, showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment. Such a card is in no sense a letter of recommendation, and in many cases might, and probably would, be of a form and character which the holder would hesitate and decline to present to any person to whom he was making application for employment. A letter of recommendation, on the contrary, is, as the term implies, a letter commending the former services of the holder, and speaking of him in such terms as would tend to bring such services to the favorable notice of those to whom he might apply for employment."

Under every rule of construction of pleadings, there is no issuable averment that the companies defendant agreed the consent of either should be essential to the employment by the other of such companies of a discharged employee, but only that an employee who had voluntarily quit the employ of either of the companies during the strike should not be employed by the other unless he could produce the "clearance" or "clearance card" in common use among railroad circles, and commonly called by railroad men a "clearance." The declaration, by its own language, explains that the instrument of "release or consent" referred to by the pleader is simply that known and commonly called a "clearance" among railroad men. It is not averred the defendant companies (defendants in error here), or any of the corporations named in the

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ance Card”—  
Judicial Notice.



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declaration, agreed or had an understanding that employees who had joined in the strike mentioned in the declaration should not be granted "clearance cards." On the contrary, the inference deducible from all that is said on the point in the declaration is that the railroad companies continued to grant clearances after the strike as before, and that plaintiff in error applied to defendant in error the Illinois Central Railroad Company for a "clearance card." The declaration does not charge said defendant company refused to grant him a "clearance card" or a "clearance" setting forth truthfully all facts proper to be stated in a "clearance card," but the language of the declaration is that said company refused to give him such an instrument as would "enable him to obtain employment in the railroad business." In what respect the release and consent or clearance which it is plainly inferred the company was willing to give the plaintiff was insufficient to enable him to procure employment from other railroad corporations is not disclosed. The declaration does not charge that the Illinois Central Railroad Company refused to state fully and fairly all facts proper to be inserted in such an instrument, or that it inserted or desired to insert in the clearance any statement that was false or injurious to him, or that had no proper place in his clearance paper. The company was not required to give him a clearance that would enable him to get employment from other companies operating railroads. As we said in the Jenkins Case, supra: "Such a card is in no sense a letter of recommendation, and in many cases might, and probably would, be of a form and character which the holder would hesitate and decline to present to any person to whom he was making application for employment." Whether the charge included in the question formulated by counsel for the plaintiff in error would constitute a cause of action was not presented to the trial court by the declaration, and we agree with the view entertained by the trial court, that the declaration failed to state a cause of action. The judgment of the appellate court is affirmed. Judgment affirmed.

Magruder, J., dissents.

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TRUDELL

v.

## GRAND TRUNK RY. CO.

(*Supreme Court of Michigan, Feb. 27, 1901.*)

[85 N. W. 250.]

**Accident on Track—Contributory Negligence of Children.\*—Plaintiff's** intestate, a boy 7 years and 4 months old, was standing on one of two tracks, or attempting to cross, when he was struck by a train and killed.

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\*See notes at end of case.

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A witness testified that deceased had been on the track about two minutes, when he called to him that a train was coming, and he answered that it was on another track, and could not strike him, referring to a train on another track; that deceased then turned, and saw the train on the track he was on, and started to run off. Deceased was a good-sized boy for his age, and there was testimony that he knew the danger of being in the way of a train or car. *Held* that, it appearing the boy knew the danger, it was error to submit the question of his contributory negligence to the jury.

**Same—Negligence.**—Where a boy 7 years and 4 months old, and of good size for his age, had been standing on a railroad track on the right of way for a couple of minutes, or was attempting to cross the track, when he was struck by a train and killed, the track being straight, so an object of his size could be seen a long distance from the engine cab, and the engineer and fireman testified the boy ran out in front of the engine, not over 15 feet from it, there was no evidence of negligence on the part of the railroad, since, if the boy had been standing on the track, the engineer would be justified in believing he would step off in time to avoid being struck.

**Same—Infant as Trespasser.**—A boy of a little over 7 years of age, playing on a railroad right of way, is a trespasser as a matter of law.

**Same—Liability for Injury to Trespasser.\***—A railroad is only liable for injuries sustained by trespassers on the right of way when the company's agents have been guilty of gross negligence.

Error to circuit court, Wayne county; George S. Hosmer, Judge.

Action by Elizabeth Trudell, as administratrix of the estate of William Trudell, deceased, against the Grand Trunk Railway Company of Canada. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Geer & Williams (E. W. Meddaugh, of counsel), for appellant.

William Stacey (Frank C. Cook, of counsel), for appellee.

Long, J. This action is brought by the plaintiff, as administratrix of the estate of William Trudell, deceased, to recover damages for injuries resulting in the death of the latter, a boy 7 years and 4 months old at the time of the injury.

*Case Stated.*

He was killed about 3 o'clock on Sunday afternoon, upon defendant's track, about half way between Mack avenue and Hale street, in the city of Detroit. At the place where the injury occurred there were two main tracks and a side track, and at the time there was a Lake Shore train coming towards him from the south, on the east main track. He was standing, as plaintiff claims, in the center of the west main track, on which the Grand Trunk train which struck him was approaching from the north. The testimony is somewhat contradictory as to whether the boy was standing on this track

\*See notes at end of case.

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when he was struck or was attempting to cross it. Herman Eckert, a boy about 14 years of age, testified that deceased had then been on that track about two minutes. He says he called the boy's attention to the fact that the Grand Trunk train was coming, and that young Trudell said, "That train is on the other track; it can't strike me;" that it was the Lake Shore train he said could not strike him; that the witness then said to him, "Look out, Willie, here it comes;" and then the boy turned round, and started to run, when he was struck. Anthony Karsnick, who saw the accident, was the only other witness examined by the plaintiff. He testified that Eckert called to the boy, and told him the train would strike him, and he said the train was on the other track; that Eckert called to him again to get off the track, and then he looked around, and started to run off. Both these boys testified substantially that the deceased knew enough to get out of the way of the train or he would be injured. Young Eckert testified that he was a good-sized boy for his age; that he went to school, and understood perfectly well that if a team or a car came along, and he stood in front of it, if he did not get out of the way he would be hurt. The testimony showed that these boys were standing on the siding, throwing stones and playing tag, and that just before the train came along deceased went upon the track of the defendant company, and stood there watching the Lake Shore train, or else he attempted to cross the defendant's track just before the train came along. There was some conflict in the evidence on this point. The engineer on the train testified: "As near as I can recollect, after I passed Mack avenue this little boy ran right out from behind some cars in front of my engine. He could not have been more than fifteen feet from my engine when I first discovered him. I was keeping a close lookout, and at no time before or after I reached Mack avenue did I see him on the track." The fireman testified to substantially the same thing. The plaintiff introduced some evidence tending to show that the defendant's train at the time was running at a rate of from 30 to 35 miles an hour. It appeared that the track was straight, and that an object as large as this boy could have been seen a long distance from the cab of the engine. The court below submitted to the jury, not only the question of the negligence of the deceased, but also the question of the defendant's negligence. The jury returned a verdict for the plaintiff for \$500. Defendant brings error.

The court charged the jury on the question of the defendant's negligence as follows: "It is incumbent, obviously, upon the plaintiff in this case, \* \* \* to satisfy you, gentlemen of the jury, that the defendant has been negligent, and that the negligence of the defendant is the proximate cause of the injury, because no damages may be honestly rendered unless the injury of which the plaintiff in a case like this complains of comes directly from the negligence of the defendant.

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Now, you have heard the testimony in this case, and if you shall find in this case that, at a point sufficient for the engineer to have come to a stop,—to have controlled his engine,—it became, or should have become, apparent to him that the child was not going to leave the track, then, and under those circumstances, I say, gentlemen of the jury, it became his duty to stop his engine. But, unless you find that to be the fact, then a verdict must be rendered for the defendant. It is for you to say, from all the evidence in the case. You have heard the testimony. You have heard the testimony of the boy, who stood, I think, upon the flat car, or in the immediate vicinity, who was one of the companions, who stated that the boy stood in the center of the track; that he called his attention to the fact that the Grand Trunk train was coming in, and he said, 'Oh, no; it is the Lake Shore train.' It is for you to say whether you believe that, from the evidence which has been submitted on that point, it was possible for the engineer of that train to have seen the boy at a sufficient distance to have stopped the train, and that a man exercising reasonable caution in his position would, under those circumstances, have stopped the train. If that is so, then I think that if he could have seen him at a sufficient distance to have stopped or controlled the train, and if he failed to observe that degree of care which other men under like circumstances would have observed, then, and under those circumstances, the company is guilty of negligence, but not otherwise. Now, you have heard the testimony, on the other hand, of the engineer. The engineer says that when he was coming along, at the rate which you may find that he was coming, the boy suddenly, at a short distance in front of the train, went upon the track. If that is so, that is obviously an end of the case, because, under those circumstances, no negligence could be predicated of those who were in the conduct of the engine. But I think, gentlemen of the jury, it becomes a question for you to determine, under the circumstances of the case, whether the defendant is or is not guilty of negligence. There is one further thing that I must say to you upon the subject, because, as I have already said to you, not only, in a case like this, must you find that the defendant has been guilty of negligence, but the plaintiff must not be guilty of contributory negligence. As I said before, if this were the case of an adult, it would be a different case. Under those circumstances, not only would there be no duty, in the sense in which I have used it, on the part of the company to stop, but beyond that there would be contributory negligence upon the part of the adult. Was the little boy, under those circumstances, guilty of contributory negligence? Now, obviously, as has been said, we cannot attribute that degree of knowledge and that degree of care to an infant that we can to an adult; and it is for you to say, under the circumstances, how much negligence should be imputed to the boy. If you believe that he was of sufficient

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maturity,—had sufficient appreciation of the danger that he was in in going upon a railroad track,—and if you believe, under the circumstances of the case, that he had sufficient maturity to keep that appreciation in mind, then, and under those circumstances, you may properly find him guilty of contributory negligence, but not otherwise. If he failed in that, obviously contributory negligence could not be attributed to him. It is you, gentlemen of the jury, I think, that must deal with this question, rather than the court. Now, I think I have said all that is necessary for me to say upon that subject."

We think the court was in error in submitting either the proposition of defendant's negligence or the negligence of the boy to the jury. The verdict, under the circumstances, should have been directed in favor of the defendant.

**Accident on  
Track—Contrib-  
utory Negligence  
of Children.**

The testimony conclusively shows that this boy, while only a little over 7 years of age, knew and appreciated the danger there was in being on this track. He knew that if he remained on the track on which the train was passing he would be injured. There is no dispute in the case but that his companion, Eckert, called to him that the train was coming, and that he heard the call, and appreciated the danger; but he called back that the train was on the other track, and that as soon as he apprehended that the train was on the track where he stood he attempted to get off. There is no reason in this case for saying that he did not apprehend the danger, nor that he was of immature years, and must therefore be excused from exercising any care. Age is not the true test in such case. It is the intelligence of the boy, not his age, that must control. In *Henderson v. Railroad Co.*, 116 Mich. 368, 74 N. W. 525, it appeared that the boy who was injured was about 8 years old. It was said: "The plaintiff himself testified that this boy had intelligence enough to appreciate the danger. He placed the boy on the stand, and he so testified. The evidence clearly shows that there was nothing except this wagon and the east-bound car to obstruct the vision. Witnesses for the plaintiff state that, if the boy had looked in the direction of the car, he could have seen it. It was but common prudence in crossing such a thoroughfare to look, not only for the car, but for any vehicle which might be coming. Injury would have occurred from collision with an ordinary wagon just as surely as from running into a car, and from the testimony of the lad himself he had intelligence enough at the time to know this. Why, then, should it be left for the jury to say that he had not?" That same inquiry might as well be made in the present case as in that. There is no conflict in the testimony whatever but that the deceased knew of the danger in being on this railroad track. He apparently fully appreciated it; for when his attention was called to the fact, and he saw for himself the situation, he hurriedly attempted to get off the track.

But, aside from this, the court should have directed the

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verdict for defendant, because it was not shown to have been guilty of any negligence. The boys were playing upon the defendant's right of way half way between two streets which crossed the defendant's tracks.

Same—Negligence.

They were in a place where the engineer had no reason to expect to see them. They were not upon a public highway crossing, but were trespassers upon the defendant's premises; and we think there is no conflict of authority that in such case the defendant can be held liable only when its agents have been guilty of gross negligence. There is no evidence in the case which would warrant the submission of that question to the jury. If the testimony of the plaintiff's witnesses be taken as true, that the boy was on the track two minutes before he was struck by the engine, it would not warrant the conclusion that the engineer was guilty of gross negligence. This boy was of good size for his age, and the engineer would be justified in believing that he would step off the track in time to avoid being struck, and the engineer would not be required to check the speed of his engine until he saw the boy did not appreciate the danger.

The learned court below seemed to think that, because the boy was of tender years, the question of the defendant's negligence was for the jury, and the claim of plaintiff's counsel

Same—Infant as Trespasser.

and the ruling of the court was that the boy was too young to be a trespasser. It was therefore left to the jury to say whether or not he was a trespasser. It has been repeatedly held that much younger children than this boy were trespassers under such circumstances. Elliot on Railroads, at section 1259, lays down the rule that "although the age of the child may be important in determining the question of contributory negligence, or the duty of the company after discovering him, the company, in general, is no more bound to keep its premises safe for children who are trespassers, or bare licensees, not invited or enticed by it, than it is to keep them safe for adults;" and again it is said, at section 1260, by the same author: "So it has been held that a railroad company is not obliged to keep a lookout for trespassing children upon its tracks under ordinary circumstances, or move its cars with reference to them, until their presence in danger is discovered." In *Masser v. Railway Co.*, 68 Iowa, 602, 27 N. W. 776, it appeared that the boy was 11 years old. It was claimed that he should have been

Same—Liability for Injury to Trespasser.

sooner discovered. The court said: "It seems not improbable that he might have been discovered a little sooner, but no locomotive engineer is bound to watch out for trespassers on the track. The company does not owe trespassers that kind of care. This has been held by repeated decisions." Counsel for plaintiff cites *Battishill v. Humphreys*, 64 Mich. 514, 38 N. W. 581, and several other cases in this state, to sustain the proposition that a railroad company is bound to use reasonable care to

**Tully v. Philadelphia, W. & B. R. Co**

avoid injuring a trespasser after seeing his danger, or after his danger could have been seen by an ordinarily prudent person. It is undoubtedly the rule that the defendant's servants would have had no right to recklessly run their engine over this boy if they had seen the danger he was in. If, however, the engineer or fireman had seen the boy on the track, they had the right to believe, from his size, that he would step off. It is not like the cases cited by counsel for plaintiff. In those cases (*Baker v. Railroad Co.*, 68 Mich. 90, 35 N. W. 836; *Starbard v. Railway Co.* [Mich.] 80 N. W. 878) the injury occurred upon street crossings, where the defendants were required to give some warning of the approach of their trains. In the present case the engineer had no reason to expect any one to be on the track, and, if any one was seen of the size of this boy, he would be justified in believing he would step off in time to avoid injury. The judgment must be reversed, and no new trial will be granted. The other justices concurred.

## NOTES.

**Contributory Negligence of Children—Apprehension of Danger.**—See *Krenzer v. Pittsburg, etc., Ry. Co.* (Ind.), 12 Am. & Eng. R. Cas., N. S., 343, and extensive *note*, 369.

**Same—Children Fourteen Years of Age.**—See *note*, 19 Am. & Eng. R. Cas., N. S., 356 *et seq.*

**Same—Children Non Sui Juris.**—See *Mason v. Southern Ry. Co.* (S. Car.), 19 Am. & Eng. R. Cas., N. S., 83, and extensive *note*, 95 *et seq.*

**Presumption That Person Seen on Track Has Ordinary Faculties.**—See *Piskorowski v. Detroit, etc., Ry. Co.* (Mich.), 19 Am. & Eng. R. Cas., N. S., 120, and *note*, 123 *et seq.*

**Presumption That Person Seen on Track Will Leave to Escape Train.**—See *note*, 19 Am. & Eng. R. Cas., N. S., 119 *et seq.*

**Duty to Trespassers on Track.**—See *note*, 19 Am. & Eng. R. Cas., N. S., 120.

## TULLY

v.

## PHILADELPHIA, W. &amp; B. R. Co.

(Supreme Court of Delaware, June 19, 1900.)

[47 Atl. Rep. 1019.]

**Contributory Negligence of Children.**—The fact that an 8 year old boy, when receiving injuries, was a trespasser, and would not otherwise have been injured, was not conclusive evidence of contributory negligence.

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**Same—Care Required of Children.\***—A child is held only to such degree of care as is reasonably to be expected from children of his age.

**Personal Injuries—Negligence and Contributory Negligence.**—One may recover for injuries arising from the negligence of another, though the injured party's own negligence exposed him to the injury, if the same was caused by the other's lack of care after becoming aware of the danger.

**Injury to Child Playing on Cars—Liability—Question for Jury.†**—A boy 8 years old was playing in a coal car standing on a side track of defendant, when some other cars were pushed against it, and the boy was thrown off and killed. There was evidence that the one having charge of the railroad yard was near the boy when he got on the car, and saw him and said nothing, and that a brakeman on the train that was pushed against the standing car, and who was signaling the engineer, saw, or could have seen, the boy just putting his leg over the side of the car, apparently for the purpose of getting out, and made no effort to avert the danger. *Held*, that it was error to direct a verdict for defendant.

**Same—Contributory Negligence—Question for Jury.**—The question of the boy's contributory negligence should have been submitted to the jury.

**Evidence.**—It was proper to refuse to admit testimony as to the customary public use of the tracks at the place of the accident, deceased not having been killed while so using defendant's property.

**Same.**—It was proper to refuse to admit testimony as to the custom of boys to play on empty cars with the knowledge of the employees, it appearing deceased was actually seen in the place of danger by defendant's employees.

Error to superior court, Newcastle county.

Action by Thomas J. Tully, as administrator of the estate of Henry Tully, deceased. From a judgment in favor of defendant, plaintiff brings error. *Reversed*.

Argued before Nicholson, Ch., and Spruance and Grubb, JJ.

Josiah Marvel, for plaintiff in error.

Herbert H. Ward and Andrew C. Gray, for defendant in error.

Spruance, J. This action was brought by the administrator of Henry Tully, deceased, for the recovery of damages for the death of the said Henry Tully, alleged to have been occasioned by the negligence of the defendant.

The material facts, as shown by the record, are as follows: An engine and train crew of the defendant had shifted a box car, coal car, and stone car from the main track of the de-

\*See notes, 19 Am. & Eng. R. Cas., N. S., 355 *et seq.*; *Mason v. Southern Ry. Co.* (S. Car.), 19 Am. & Eng. R. Cas., N. S., 83, and notes, 95 *et seq.*

†See notes at end of case.



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fendant's road in the city of Wilmington to a side track known as the "corn track," leaving the end of the stone car projecting over the main track. Immediately thereafter the said Henry Tully, aged about 8 years, and two other small boys, climbed into said coal car, which was empty, for the purpose of picking up refuse coal. Henry Tully went first into the gates at the bottom of the car, and, quickly returning, went to the end of the car towards the main track, and put one leg over the side of the car, apparently for the purpose of getting off of the car. At this time the engine was on the main track, pushing a box car, upon the top of which was a brakeman giving signals to the engineer. Just then some one called out: "You can't pass. Come back again." The brakeman gave the signal to back, the engine came back, and the box car, pushed by the engine, struck the end of the stone car projecting over upon the main track with such force as to drive forward eight or nine feet the three cars upon the corn track, and throw Henry Tully from the coal car. The car wheels passed over him, and he was instantly killed. A person in the employ of the defendant, described as "the head brakeman or conductor, who ruled everything around there; \* \* \* the man who bossed them all," passed within three feet of Henry Tully as he was getting into the coal car, and looked at him, but said nothing. Before and at the time of the accident the brakeman on the top of the box car pushed by the engine was looking down upon the boys in the coal car, and saw them, or could have seen them. The sides of the coal car came only up to about the waist of Henry Tully. While the boys were on the coal car, no warning was given by bell, whistle, or otherwise. Upon the close of the testimony for the plaintiff the defendant moved for a nonsuit upon the grounds: First, that the testimony failed to show that the defendant was guilty of negligence; and, second, that the testimony showed that the plaintiff's intestate was guilty of contributory negligence. The court ordered a nonsuit, but, the plaintiff having declined to take the same, the court instructed the jury to return a verdict for the defendant. The plaintiff excepted, and his eighth assignment of error is as to this instruction of the court.

If there was no evidence of negligence on the part of the defendant, or no evidence from which the jury could reasonably infer such negligence, it was the duty of the court to withhold the case from their consideration, as a verdict for the plaintiff, under such circumstances, would have been set aside. *Creswell v. Railroad Co.* (Del. Sup.) 43 Atl. 629. But it should not be forgotten that it is the province of the jury to determine doubtful questions of fact, and that, where the evidence, or the reasonable inferences that the jury might draw from it, would be sufficient to support a verdict for the plaintiff, the case should be submitted to the jury. Considering the evidence as to the circumstances under which Henry Tully and his companions were upon the property of the de-

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defendant most unfavorably to the plaintiff, and regarding the boys as simple trespassers, was there any sufficient evidence of negligence on the part of the defendant, or any evidence from which the jury could have reasonably inferred such negligence? "Negligence, in a legal sense, is no more or less than this: the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury." Cooley, Torts, 630. While the obligation to exercise care in the conduct of one's business varies under different circumstances, there always remains the duty to exercise such reasonable care as should be exercised by a person of ordinary prudence under like circumstances. In Cummins v. Presley, 4 Har. (Del.) 315, it was held that the master of the defendant's vessel was without excuse for running against a vessel out of her proper place, and in a position of danger, in a navigable stream, if, by the exercise of ordinary skill, care, and diligence, he could have avoided the collision; and that in such case the defendant would be liable. It is universally conceded that a trespasser may recover for injuries resulting from the gross negligence or carelessness of the defendant. Weldon v. Railroad Co., 2

Contributory  
Negligence of  
Children.

Same—Care  
Required of  
Children.

Personal Injuries  
—Negligence  
and Contributory  
Negligence.

Injury to Child  
Playing on Cars—  
Liability—Ques-  
tion for Jury.

Pennewill, 1, 43 Atl. 156. The mere fact that a plaintiff, when he suffered the injury complained of, was a trespasser on the defendant's premises, and would not have been injured if he had not so trespassed, is not conclusive evidence of contributory negligence. 1 Shear. & R. Neg. § 97. While the decisions upon this point have been conflicting, there are many approved cases in which trespassers have recovered damages for personal injuries, and this is especially so in cases of children. Id. § 98. In the application of the doctrine of contributory negligence to children the rule governing adults is greatly modified. A child is held only to the exercise of such degree of care and discretion as is reasonably to be expected from children of his age. The care required of a child is to be ascertained by his maturity and capacity and the particular circumstances of the case, and the determination of the question should generally be submitted to the jury. Id. § 73; Weldon v. Railroad Co., 2 Pennewill, 1, 43 Atl. 156; Railway Co. v. McDonald, 152 U. S. 281, 14 Sup. Ct. 619, 38 L. Ed. 434. "It is now perfectly settled that the plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. We know of no court of last resort in which this rule is any longer disputed." Shear. & R. Neg. § 99. This

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doctrine was fully discussed and adopted by the house of lords in *Radley v. Railway Co.*, 1 App. Cas. 754, and by the supreme court of the United States in *Coasting Co. v. Tolson*, 139 U. S. 558, 559, 11 Sup. Ct. 653, 35 L. Ed. 270. It is obvious that the empty coal car from which Henry Tully was thrown was, under the circumstances, from the time he got upon it, a

Same—Contrib-  
utory Negligence  
—Question for  
Jury.

place of great danger to a boy of his age. If the case had gone to the jury, and they had found from the evidence that the defendant's servant in charge of the business of shifting cars, there going on, saw Henry Tully, a boy of 8 years old, in a place of danger on one of the said cars, and failed to make any effort to prevent him from exposing himself to such danger, or any effort to avert such danger; and that the signaling brakeman on the car attached to or pushed by the shifting engine saw, or from his position should have seen, the boy in a place of danger on one of the cars he was approaching, in time to avoid the danger, or give warning of it, and that he made no effort to avoid the danger or warn the boy,—the jury would have been justified in finding the defendant guilty of such negligence as would render it liable in this action. We are of the opinion that the question as to negligence of the defendant and the question as to the contributory negligence of the plaintiff's intestate should, under proper instructions by the court, have been submitted to the determination of the jury, and that the court erred in directing the jury to render a verdict for the defendant.

The other assignments of error relate to the refusal of the court to admit certain testimony. The seventh assignment was abandoned by the plaintiff. The fourth and fifth relate

Evidence.

to the refusal to admit testimony as to the customary public use of the tracks and right of way of the defendant at or near the place of the accident for the purpose of passage between Buena Vista and Market streets. As the plaintiff's intestate was not killed while so using the property of the defendant, the rulings of the court in this respect were clearly correct. The remaining four assignments of error relate to the refusal to receive testimony tending to show a custom or habit of boys to be upon empty cars on the defendant's tracks, with the consent or knowledge of the employees of the defendant. Our conclusion as to the charge to

Same.

the jury, and the evidence that Henry Tully was seen by the servants of the defendant upon the car from which he was thrown, render a critical examination of these assignments unnecessary. If the question was whether the servants of the defendant exercised due diligence in the discovery of the presence of boys upon empty cars, the inquiry whether boys were accustomed to be there might be important; but where it appears that the person killed was actually seen in the place of danger by the servants of the defendant in time to avoid his injury or death, it is quite

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immaterial whether he and other boys were or were not accustomed to be upon the empty cars of the defendant. The judgment below is reversed.

## NOTES.

**DUTY OF RAILROAD COMPANY TO INFANT TRESPASSERS.**

**Ejection of Infant Trespasser from Train—Care Required.**—A servant of a company in the performance of his duty in removing a trespassing boy from the company's train is bound to exercise ordinary care. *Brill v. Eddy*, 115 Mo. 596, 22 S. W. Rep. 488.

**Liability for Injury to Boy Trespasser Ordered from Moving Train.**—See *note*, 19 Am. & Eng. R. Cas., N. S., 754.

**Liability for Injury to Child Trespassing on Moving Train.**—See *Underwood v. Western & A. R. Co. (Ga.)*, 13 Am. & Eng. R. Cas., N. S., 739, and *note*, 742.

**Liability Where Infant Trespasser Is Injured on Track—Absence of Lookout on Rear of Car.**—See *Green v. Chicago & W. M. R. Co. (Mich.)*, 6 Am. & Eng. R. Cas., N. S., 317, and *note*, 318 *et seq.*

**Liability for Injury to Children Playing on Turntables.**—See *Truess v. New York, etc., R. Co. (N. J.)*, 11 Am. & Eng. R. Cas., N. S., 297, and extensive *note*, 305 *et seq.*

**Liability for Injuries to Children Riding on Cars by Permission of Employees.**—See *Burke v. Ellis (Tenn.)*, 19 Am. & Eng. R. Cas., N. S., 696, and *note*, 701 *et seq.*

**Liability Where Children Are Injured on Track or Grounds of Railroad Company.**—See generally, *Missouri K. & Y. R. Co. v. Edwards (Tex.)*, 5 Am. & Eng. R. Cas., N. S., 343, and *foot-note*.

**Boy Trespasser Ordered from Engine About to Start.**—An eight-year-old boy, trespassing upon the premises of a company, got on the step of the engine and was ordered off by the fireman, and as he jumped off he fell. The locomotive was started at the moment and the tender passed over his arm. He was a boy of more than average intelligence, and had been warned against going on the premises or riding on the engine. *Held*, that the company could not be held liable for the injury without showing that the engineer or other servants of the company in charge of the locomotive knew that the child was in the way, or that they had been reckless or negligent in the management of the engine, or could have anticipated the injury. *Chicago & N. W. R. Co. v. Smith*, 4 Am. & Eng. R. Cas. 535, 46 Mich. 504, 9 N. W. Rep. 830.

**Boy Riding on Footboard of Engine.**—To entitle a boy injured while riding on the footboard of an engine to recover against the company, the engineer must have been guilty of gross negligence and the boy free from contributory negligence. *Hughes v. Detroit, G. H. & M. R. Co.*, 78 Mich. 399, 44 N. W. Rep. 396.

**Injury to Child Playing About Cars Left on Gravity Railroad.**—In *Hasley v. Winona & St. P. R. Co.*, 46 Minn. 233, it was held that a railway company maintaining what is known as a "gravity" yard or side track has undoubtedly performed its duty as to a trespassing child of tender years, strictly *non sui juris*, when it securely fastens by means of the ordinary appliance or brake, such cars as it may have occasion

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to place upon the grade of its track. The court said: "In the earliest of the so-called 'Turn Table Cases' in this state (*Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207) it was aptly said that a railway company is not required to make its land a safe playground for children, nor was it an insurer of the lives or limbs of young children who play about its premises. When, however, it sets before such children a temptation which it has reason to believe will lead them into danger, it must use reasonable care to protect them from the danger to which they are exposed. In subsequent cases of the same nature the rule last mentioned has been sanctioned, although in one instance limited in its application. *Twist v. Winona & St. P. R. Co.*, 39 Minn. 164, 37 Am. & Eng. R. Cas. 336; *O'Malley v. St. Paul, M. & M. R. Co.*, 43 Minn. 289, 43 Am. & Eng. R. Cas. 62. But nothing more than ordinary or reasonable care is required of persons who have placed upon their own premises such dangerous machinery as turntables, attractive, alluring, and open to children of tender years, strictly *non sui juris*. *Kolati v. Minneapolis & St. L. R. Co.*, 32 Minn. 133. It is the doctrine of these cases which is invoked by the appellant in the consideration of his appeal, and by which he asks that defendant's liability for this unfortunate occurrence be determined. Proceeding, then, upon the assumption that the rules which have been established in the Turn Table Cases are applicable in actions arising out of accidents of a somewhat different character, as was that now before us, the question is simply whether the defendant railway company exercised reasonable care as to children of tender years when leaving its cars with their brakes firmly set, upon the grade of the side track, a few feet distant from a level surface upon which its track ran for several hundred feet. To answer this query in the negative we must hold that it was the duty of the company to provide something more than the ordinary mode of locking its cars when placed at any point on the incline, or that it was its duty to exercise police supervision over its cars when on this particular part of the track, adequate to the danger to be apprehended,—that is, such a supervision as would keep trespassing adults and children able to release a brake, off from the same; or that, as to some uses for which a side track is specially maintained, not only 400 feet of this, but a part of every other side track in the land, similarly built and situated, must be surrendered and abandoned, in order that they may not prove dangerous, alluring, and attractive to children who have not yet arrived at years of judgment and discretion, but who are old enough to seek out railway cars as proper objects with which to amuse themselves. But if either of these things were demanded of defendant a most serious burden would be imposed, a very unreasonable thing, in fact, and in the exercise of ordinary care nothing unreasonable is required. To be sure, the defendant could have placed its cars upon the level portion of its side track, although from the testimony it is obvious that precisely this form of accident might have resulted had it done so. Again, it might have stored its cars, when not in use, upon a side track in the country, remote from habitations, and thus have avoided the danger; but no such vigilance is required. We are of the opinion, to say the least, that when the defendant left its cars with the brakes fastened in the manner indicated by the undisputed testimony, its duty was performed towards plaintiff's intestate."

KRAMER

v.

SOUTHERN RY. CO.

(*Supreme Court of North Carolina, Dec. 19, 1900.*)

[37 S. E. 468.]

**Injury to Boy Playing on Cross-Ties Piled in Public Street—Liability—Remedies.**—Boys of tender years were in the habit of playing on cross-ties owned by defendant, and piled in a public street near its track, and one of them, in attempting to climb onto the pile, was killed by the ties falling on him. *Held*, that an instruction that, if the ties were piled on a part of the street which could not be used as a highway, there was no obstruction of the street, and that if leaving the ties there was wrongful the only action for the obstruction would be by indictment or by suit of an individual who was injured while using the street as he had a right to, was proper.

**Same—Same—Same.**—An instruction that, though the jury might find that there was an obstruction of the street, yet, to find that intestate's death was due to the negligence of defendant, they must find that it knew that boys of tender years were in the habit of playing on the ties, was proper.

**Same—Same—Same.\***—An instruction that, if the jury found that there was no obstruction of the highway, they must find that defendant was not negligent, was erroneous, since the boys were not trespassers, and the negligence, if any, consisted in the defendant's neglect to prevent such play, or guard against injury, after it had knowledge of the custom of the boys.

FAIRCLOTH, C. J., and FURCHES, J., dissenting.

Appeal from superior court, McDowell county; Shaw, Judge.

\*Action by Sarah Kramer, administratrix, against the Southern Railway Company. From a judgment for defendant, plaintiff appealed, on which the judgment was affirmed. On rehearing. Reversed.

E. J. Justice, for appellant.

G. F. Bason, A. B. Andrews, Jr., and F. H. Busbee, for appellee.

Montgomery, J. This case was disposed of at the last term of this court by a per curiam order affirming the judgment below, which was in favor of the defendant. A petition by the plaintiff to rehear was allowed, and the case  
Case Stated. is again before us for our reconsideration. The action was brought by the mother of the child, as his admin-

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\*See notes at end of case.

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istratrix, under section 1498 of the Code, to recover compensation for the pecuniary injury resulting from the death. The plaintiff in her complaint alleged that the defendant owed the public and her intestate the duty of keeping the street and its road free from obstruction, dangerous or unsafe, and which might injure the public or any of its members, and that in violation of this duty it placed dangerous obstructions in the street, to wit, a large number of railroad cross-ties, which were so carelessly piled as that on the 27th day of July they fell on the intestate of the plaintiff, a child of 9 years of age, and by which he received injuries from which he died on the 17th of August, 1898. The facts, so far as they are necessary to be stated for the purposes of this appeal, are these: On Garden street, in the town of Marion, where the defendant's railroad crosses the street, the defendant had piled a lot of cross-ties, not in the manner called "cribbing," but straight and in rows, one on the top of the other. The street at that point was originally laid out to be 60 feet wide, but only about 14 feet of it had ever been, or could have been, used in its then present condition as a public highway for vehicles, and there were no sidewalks for pedestrians. In the summer of 1898 some little boys had a habit of playing on the cross-ties, and while so engaged in play, on the 27th day of July, one of them, Hugo Kramer, the plaintiff's intestate, 9 years old, that he might get a better view of a passing train, undertook to climb up on the cross-ties, and in so doing pulled some of them over, and upon him, by means of which he was so badly hurt that in a few weeks he died. The gravamen of the complaint is the defendant's negligence growing out of its obstruction of a public street.

If the cross-ties had been piled upon the defendant's own premises instead of in the street, and the defendant had had no actual knowledge that the children were in the habit of playing on the ties, the law would have imposed no duty upon the defendant to look out for their safety by having the ties piled with a view to that end. *Railway Co. v. Edwards*, 90 Tex. 65, 36 S. W. 430, 32 L. R. A. 825. The principle announced in the *Turntable Cases* (*Railway Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745, and others) would not apply if the ties had been carelessly piled on the defendant's premises. The *Turntable* decisions are necessarily based either on the idea that such machinery has such peculiar attractions for children as objects of play that, when left unlocked, there is an implied invitation to use them, or, when not properly guarded, it is so obviously dangerous to children as to call for diligence in the owner to take precautions against the dangers. Those cases are exceptions to the general doctrine, and went to the very limit of the law. Mere attractiveness of premises to children will not bring a case within that exceptional doctrine. Indeed, the plaintiff's counsel in his argument here ~~stated that he did not contend for the application to this case~~

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of the principle laid down in the Turntable Cases. His argument was mainly addressed to the discussion of three of the plaintiff's exceptions,—two, the first and fifth, bearing on the court's instructions upon the obstructions of the public street or highway; and the third on the negligence of the defendant, as connected with, and dependent upon, the defendant's knowledge of the habit of the children of playing on the cross-ties.

In the portions of his honor's charge to which exceptions 1 and 5 were directed, the jury were instructed, in substance, that there was no obstruction of the street, unless the cross-ties

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were in that part of the street which was used by the public, and that if the ties were upon that part of the street which was not used by the public, and could not be used, there was no obstruction of the highway; and, further, that the defend-

ant company was guilty of a wrongful act in allowing it to remain there; but, nothing else appearing, the only remedy for that wrongful act would be indictment by the grand jury, and the defendant be punished in a criminal action for obstructing the public highway; "and a private individual would have no right to maintain an action against the railroad company for obstructing the street unless that private individual was injured—received special injuries—on account of the pile of cross-ties being there, an obstruction to the highway, and while the party was using the highway as he had a right to do." We see no error in that instruction. If the whole—all parts—of the street had been in a condition to be traveled and used by the public, and by habit and custom the public had used only a certain portion of it, then the instruction would have been wrong. But that is not the case here. There was evidence that only that portion which was used could have been used; the other part being unfit for use. The piling of the ties on the unused part of the street might have been without leave of the town, and the defendant might have been a trespasser, but, under the facts of this case, it had not obstructed the street.

The court further instructed the jury that, although they might find that the pile of cross-ties was an obstruction there in the street, the plaintiff's cause of action was not founded upon that primarily, and that, before they could say that the intestate's injury and death were caused by the negligence of the defendant, they should inquire whether or not the defendant knew that the pile of cross-ties in the street was a common resort of little boys of tender years in that neighborhood to play, and the burden was on the plaintiff to show that the railroad company knew that fact, and that, if the defendant did not know it, then they should answer the issue as to the defendant's negligence, "No." That was a correct instruction, and was consistent with the one just discussed.

But his honor further told the jury: "If you find that it [the



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pile of cross-ties] was not an obstruction to the highway, then it would be your duty to answer this issue [as to the defendant's negligence], 'No.' "

Same-Same-Same.

In this instruction there is error. The pile of cross-ties was not on the defendant's premises. It was on a public street in the town of Marion, and, even though the defendant might have been tacitly permitted to use the street for the purpose of piling the ties, yet the plaintiff's intestate was not a trespasser. If he was too young to be bound by any rule as to contributory negligence, and had a habit of playing, with other boys, on the cross-ties, with the knowledge of the defendant, and without the defendant's attempting to prevent such sport or to take precautions against injury to the children, then the defendant was negligent. In such a case the defendant's negligence would not consist in piling the cross-ties in the street, but it would consist in its failure to guard against injury to the children, after it had learned of their habit of playing on the ties, and its failing to provide against their injury; and this is particularly true as the ties were not on the defendant's property, and the plaintiff's intestate not a trespasser. The petition is allowed, and a new trial is ordered. New trial.

Faircloth, C. J., dissents.

Furches, J. (dissenting). This is an action for damages under the statute for the negligent killing of plaintiff's intestate, Hugh Kramer, a boy 9 years of age. The facts, briefly stated, are that in the year 1896 one Grayson Lewis, the owner of a lot of cross-ties, hauled and piled them on an unused part of Garden street, within 10 or 12 feet of the defendant's railroad track. In the latter part of the year 1897, Lewis sold them to one Dysart, and in April, 1898, Dysart sold them to defendant railroad company. On the 17th of August, 1898, the intestate of plaintiff and other boys of about the same size and age were playing on this pile of cross-ties, when some of the ties fell upon the intestate, and so injured him that he died in a few weeks. The ties were piled lengthwise, not crossed, or "cribbed," as it is called, and, being so piled, it is alleged, were dangerous for boys to play on. But defendant did not place them where they were, nor did it pile them there, but they were just where Lewis piled them in 1896, and just as they were when defendant bought them. Upon the trial below, the verdict and judgment were against the plaintiff, and she appealed to this court, and at the last term her appeal was considered, and the judgment appealed from was affirmed. It is now before us upon a petition to rehear.

It has been held by this court that the decision at the former hearing, on an application to rehear, is a precedent. But, if so, how far it should influence the court, or what weight should be given to it, we will not undertake to say. But the

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general rule, as we understand it, is that it devolves upon the appealing party to show substantial error which did or might have injured him, or the judgment appealed from will be affirmed. It may therefore be, and we will not say that there is no error in the charge of the court. But, if there is, upon a careful examination we are unable to see that plaintiff is injured, or that she might have been injured, by any such error, if there was such error.

To make the defendant liable, it must be shown that defendant has been guilty of doing something wrong, or has been guilty of negligence which was the proximate cause of intestate's injury and death. And it devolves upon the plaintiff to show this. To do this, the plaintiff shows that in April, 1898, the defendant bought a lot of cross-ties that had been piled there two years before it bought them; that these boys had been in the habit of playing on them for months before defendant bought them without being injured, but that by the accidental falling of some of these ties, some two or three months after defendant bought them, the intestate was injured and killed. The plaintiff admitted on the argument that the "Turntable Cases," as they are called (17 Wall. 657, 21 L. Ed. 745), did not apply, as those cases were put upon the ground that a turntable was specially attractive to a child, and exceedingly dangerous; that the principle involved in those cases had no application to this case, as a pile of cross-ties was not specially attractive, nor was it as a general rule dangerous.

But, while the plaintiff properly conceded that the Turntable Cases did not apply, it was contended that defendant was liable upon another line of authorities, where it is held that if a lumber dealer piles wood or lumber on his own premises, though carelessly piled, and children play upon it, and are injured by its falling, the owner of the lumber is not liable in damages; but, if he piles his lumber on the land of some one else, he is a trespasser, and, if the lumber falls and injures the child, he is liable in damages. If there is such a distinction, it is upon the merest technicality. But suppose we admit this doctrine to be correct, and try the case by this rule, and the defendant is not liable. The defendant is compelled to have cross-ties to repair and keep its road in order. It cannot pile them on its track or roadbed. That would be to obstruct the running of its trains, and stop the transportation of passengers and the movement of freight. It is therefore compelled to put them on its right of way. And we know, as a matter of law (Laws 1854-55, c. 228), that the defendant has an easement of 100 feet on each side of its roadbed for just such purposes as this. Suppose these cross-ties had been piled on some other part of this easement that had not been located as a public road or street; could it be contended that it had no right to do so, and that it was a trespasser?

We must suppose that plaintiff would admit that defendant

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has the right to pile cross-ties on its easement not occupied by any one. But plaintiff says, if this is so, the defendant had no right to pile its cross-ties in the public road, and in so doing it was a trespasser, and therefore liable. Assuming, for the present, that they were piled within less than 100 feet of defendant's roadbed, which we will presently show to be the fact from plaintiff's testimony, this is the question: Was the defendant a trespasser in allowing these cross-ties to remain where they were when it bought them?

The public road or street having been located over the ground where they were piled did not take the defendant's easement from it, except so far as the public use demanded it as a public highway, and defendant had the same right to use it as a public highway that any one else had. It could not, therefore, be a trespasser by using the road, though it may have used it improperly. If any one using the street as a public highway had been injured on account of the cross-ties being in the public street, he might have been entitled to damages. But his action would not have been against the defendant as a trespasser, but for unlawfully obstructing the public highway, whereby and by reason of such obstruction he was injured. The plaintiff cited *Dillon v. City of Raleigh*, 124 N. C. 184, 32 S. E. 548, as authority for her position; but upon examination it will be found that it does not sustain her, but sustains the position we have taken. That was not an action against the city as a trespasser, but for allowing its streets to be and remain obstructed, and by reason of said obstruction the plaintiff was injured. Suppose the plaintiff in *Dillon v. City of Raleigh* had gone upon the bridge over the railroad, where the obstructions were in the street below, and had fallen and been injured; would the plaintiff contend that the city was guilty of a trespass, and therefore liable in damages? but we have said that the defendant's rights, as the owner of the easement, were only suspended so far as the traveling public demanded their suspension. Here was a public street located 50 or 60 feet wide, but it had only been open for public use for a space of 12 or 15 feet wide; the other 35 or 40 feet had not been open for public use, and was not used by the public as a highway. Then, can it be possible that defendant's right to use it for the very purpose for which it was granted to defendant was suspended, and the defendant became a trespasser by using it? This is the turning point in the case, according to plaintiff's view, as the attorney of plaintiff in his brief, discussing this case in connection with the Turntable Cases, says: "If a railroad company puts a turntable and a pile of cross-ties on its own land, and a boy is injured on the pile of cross-ties, and another boy is injured on the turntable, then the distinction the court made might save the company from liability as to the boy who was injured on the cross-ties, and it might be said that as to him the company had done no wrong and neglected no duty."

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So it seems to us that the only thing remaining to be shown is that the cross-ties were piled upon the company's easement, which, as we have said, the plaintiff's evidence shows to be so. D. H. Hudgins, a witness for plaintiff, on cross-examination testified: "Question. The railroad crossed Garden street near where this pile of cross-ties lay? Ans. Yes." Same witness: "Question. Do you know those cross-ties were piled east of the east end of the crossing? Ans. Just about on a line with it." Same witness: "Question. And in order to run into that pile of cross-ties a man would have to run into a ditch? Ans. No; he would have to cross the railroad track, and then go on, say 10 or 12 feet, and then he would be opposite the end of the cross-ties." The evidence is uncontradicted that the cross-ties were piled on land located as a street, but had never been worked, and was not, and had never been, used by the public as a street. The evidence was all introduced by the plaintiff, and we are of the opinion that, taking every word of it to be true, the plaintiff failed to make a case, and that defendant's motion at the close of the evidence for judgment of nonsuit should have been granted. The petition to rehear should be dismissed.

## NOTES.

**Dangerous Premises—Liability for Injury to Child Playing on Pile of Bridge Ties in Company's Lumber Yard.**—The defendant railway company owned a lumber yard, which was used for storing bridge material and lumber and was fenced except on one side along the company's track. The plaintiff, an eight-year-old child, lived just across an alley from the yard, and with other children, was accustomed to play in the yard, notwithstanding the persistent efforts of the company's servants to keep them out. The plaintiff had been ordered out by the watchman of the yard, but immediately upon his leaving to attend to other matters, she re-entered the yard, and while climbing upon a pile of bridge ties, one of them fell down and crushed her toes. *Held*, that the plaintiff could not recover for the injuries sustained by such accident. *Missouri K. & T. R. Co. v. Edwards* (Tex.), 5 Am. & Eng. R. Cas., N. S., 343.

**Liability for Injuries to Children Playing on Turntables.**—See extensive note, 11 Am. & Eng. R. Cas., N. S., 310.

## TULLIS

v.

## LAKE ERIE &amp; W. R. CO.

*(Circuit Court of Appeals, Seventh Circuit, January 15, 1901.)*

[105 Fed. Rep. 554.]

**Bill of Exceptions—Time for Settling—Pendency of Motion for New Trial.**—When, by reason of a motion for a new trial or rehearing, or to set aside the judgment, entered at the term when the judgment was

## Tullis v. Lake Erie &amp; W. R. Co

rendered, the power of the court over the judgment is retained, a bill of exceptions may be settled, or time given for preparing it when the motion is overruled, whether at the same or a later term.

**New Trial—Procedure in Federal Courts—State Practice.**—Rev. St. § 914, does not require conformity to the state practice by the federal courts in respect to motions for new trial or bills of exceptions, and, where a motion for new trial was filed and disposed of in accordance with a rule of court, it is immaterial that the requirements of the state practice were not observed.

**Master and Servant—Rules of Railroad Company—Evidence of Waiver.\***—A railroad company may waive any of its rules governing employees, and where, in an action by an employee for a personal injury, it invokes such a rule, and its non-observance by the plaintiff, as a defense, evidence is competent to show that the rule was never observed by employees, nor insisted on by their superiors, and the question of waiver is one for the jury.

**Same—Action for Injury to Servant—Evidence.**—In an action by a brakeman against a railroad company to recover for a personal injury, where it is shown as a defense that at the time of the injury plaintiff was not in the place required by a rule of the company, testimony of the division superintendent that he would discharge any employee who persistently violated such rule to his knowledge is not a statement of fact, and is incompetent to disprove a waiver of the rule by the company.

**Same—Violation of Rules by Servant.**—Where the rules of a railroad company provided that brakemen should be under the direction of the conductor at all times when on duty, and should remain at their post of duty at all times unless excused by the conductor, and further provided that conductors on freight trains should require their brakemen to be on top of the cars when ascending or descending grades, it cannot be held as a matter of law that a brakeman violated his duty by being in the caboose, with the knowledge and acquiescence of the conductor, when the train was starting up a grade.

**Same—Contributory Negligence.**—Plaintiff, who was rear brakeman on a freight train, was in the cupola of the caboose when an engine which was to assist in pushing the train up a grade was negligently run against the caboose with such violence as to derail it, by which plaintiff was thrown to the ground and injured. *Held* that, conceding that plaintiff's duty required him to be on top of the cars, his remaining in the caboose was not negligence which contributed to his injury in a legal sense, but was a mere condition of the injury, since the rule requiring him to be outside was not made for his protection, and, under any ordinary circumstances, he would be safer inside the caboose than on top of the train.

In Error to the Circuit Court of the United States for the District of Indiana.

The plaintiff in error, Hosea B. Tullis, employed as a rear brakeman upon a freight train of the Lake Erie & Western

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\*See *Louisville & N. R. Co. v. Bowcock* (Ky.), 17 Am. & Eng. R. Cas., N. S., 421, and *notes*, 430 *et seq.*

*Tullis v. Lake Erie & W. R. Co*

Railroad Company, going eastward on the night of February 10, 1895, was injured by the negligent management of a locomotive which was following the train

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for the purpose of pushing it over a steep grade up which it had started or was just about to start. The pusher ran against the caboose of the train with such violence as to throw it from the track. The plaintiff, who was at the time in the cupola on the caboose, observing that a collision was imminent, endeavored to escape through a side window, but was thrown by the violence of the shock upon the frozen ground, and seriously injured. The engineer whose negligence is alleged to have caused the injury being a fellow servant, it was only by virtue of the act of the Indiana legislature approved March 4, 1893 (Sess. Laws 1893, p. 294), that the action could be maintained. The constitutionality of that act was denied in this case, but, upon certification of the question by this court to the supreme court, has been established by the decision of that court. *Tullis v. Railroad Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192. It now remains, therefore, to consider whether in the proceedings at the trial there intervened error for which the judgment should be reversed. The errors alleged and insisted upon relate to the exclusion and admission of evidence, and to the refusal of requests for instruction.

The following rules of the company, under the titles quoted, were read in evidence:

**"Conductors Have Control of Their Men."**

"(90) Conductors have full control of all men placed under their direction, and will be held strictly responsible, with the men, for any violation of the rules and regulations, or the want of judgment and action in emergencies. They must know that their men are at all times at their posts of duty. One man must invariably be kept on the rear car of every train while in motion, and on freight trains one man must be kept on the forward end or on the engine in bad weather. They must have in their possession at all times the proper danger signals, ready for use in an emergency. Passenger brakemen must take their position near the door, never using a seat when in use or needed by passengers, and must refrain from any discussions or arguments with the passengers."

**"Freight Men on Top of Trains."**

"(93) Freight conductors are expected to ride on top of the train as much as possible, where they can apply the brake if necessary, and see that their brakemen do their duty. They must require all the brakemen to be on top of the train at least one-half mile before arriving at and while passing all stations and stopping places, descending or ascending grades, or at any point or time when extra precaution is necessary to ensure safety."

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"For Brakemen—Brakemen Study Time Table."

"(128) Brakemen are under the direction of the conductor at all times when on duty with their trains. They are expected to study and become familiar with the time table and the rules and regulations of the service."

"(132) They must remain at all times at their post of duty, unless excused by the conductor, or another brakeman must perform his duties."

Addison C. Harris, for plaintiff in error.

W. H. H. Miller and John B. Cockrum, for defendant in error.

Before Woods and Jenkins, Circuit Judges.

Woods, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The specifications of error relied upon all depend upon the bill of exceptions, and, it is insisted, cannot be considered because the bill was not signed, nor time for the preparation and filing thereof extended, during the term at which the trial was had and judgment entered. It appears, however, that a motion for a new trial, and briefs in support of it, were filed a few days before the close of the term. According to the docket entry, this was done in open court before the judge who presided at the trial; but it is stated in the bill of exceptions that the motion and brief were filed in the clerk's office, and were not brought to the attention of the judge until an early day in the next term of the court. The briefs were filed in conformity to the rule of court adopted on September 27, 1892, to the effect that all motions, demurrers, or exceptions thereafter filed should be supported by briefs filed therewith in duplicate, of which the clerk should forthwith notify the adverse party to whom fifteen days should be allowed for filing answering briefs, and that, if oral argument should be desired by either party, it should be asked at the time of filing briefs. Within the time allowed by the rule, but at the ensuing term of the court, the attorneys for the defendant in error filed in the clerk's office their answering brief on the motion for a new trial, and, neither party having asked an oral argument, the clerk carried the motion and briefs to the judge in chambers. A few days later the motion was overruled, exceptions allowed, and sixty days given the plaintiff in error in which to file a bill of exceptions, the judge stating at the time that, in his opinion, the exceptions and bills would be of no avail. The bill was prepared, signed, and filed within the time allowed, embracing amendments suggested by the attorneys for the defendant in error, who, however, objected to the signing of the bill on the two grounds that the court was then without power to sign a bill, and that the time for taking a writ of error had

Bill of Exceptions—Time for  
Settling—Pendency of Motion  
for New Trial.

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passed. While it is well settled that a bill of exceptions can be signed only at the term of court at which the trial was had and judgment entered, or within an extension of time then granted (*Brooder Co. v. Stahl*, 42 C. C. A. 522, 102 Fed. 590), yet if by reason of a motion for a new trial or rehearing or to set aside the judgment, entered at the term, the power of the court over the judgment is retained, a bill of exceptions may be settled or time given for preparing it when the motion is overruled, whether at the same or a later term (*Woods v. Linvall*, 1 C. C. A. 34, 48 Fed. 73, 4 U. S. App. 45; *Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251; *Railroad Co. v. Murphy*, 111 U. S. 488, 4 Sup. Ct. 497, 28 L. Ed. 492; *Smelting Co. v. Billings*, 150 U. S. 31, 14 Sup. Ct. 4, 37 L. Ed. 986; *Voorhees v. Manufacturing Co.*, 151 U. S. 135, 14 Sup. Ct. 295, 38 L. Ed. 101). "Until then the judgment or decree does not take final effect for the purpose of a writ of error" (*Smelting Co. v. Billings*); and until then there is no good reason for saying that the time for settling a bill of exceptions, the necessity for which could not be known sooner, had passed. This proposition is not affected by the fact that in the federal courts the ruling upon a motion for a new trial is discretionary, and not reviewable. It does result,

New Trial—Pro-  
cedure in Fed-  
eral Courts—  
State Practice.

however, from that fact that section 914 of the Revised Statutes of the United States does not require conformity to the state practice in respect to motions for a new trial or bill of exceptions (*In re Chateaugay Ore & Iron Co.*, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508); and it is immaterial to inquire whether, under the practice in the state courts, the filing of the motion in the clerk's office without calling it to the attention of the court would have been of no effect. Whatever might otherwise have been the proper practice, the rule adopted by the lower court was intended to authorize the course pursued. The attorneys for the defendant in error filed their answering briefs without questioning that the motion had been regularly filed, and the court, without suggestion of a want of power, entertained the motion, and decided it on the merits.

Rule 93 having been read in evidence, the plaintiff in error offered to testify that during the two years of his employment as brakeman upon the road of the defendant it was not required of any brakeman by any superior office at any time to be upon the top of cars at any time between stations when going up or down grade, and testimony to the same effect from two other witnesses was offered, but upon objection was ruled out, on the ground, stated at the time by the court, that, this plaintiff having admitted that he signed a contract in which he agreed that he would study and abide by the rules on the time card, that made "a contract between him and the defendant, and, although every other man on the railroad may have disregarded the rule, he was bound by his contract to observe it." This

Master and Serv-  
ant—Rules of  
Railroad Com-  
pany—Evidence  
of Waiver.



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was erroneous. It was within the power of the company to waive any rule of its own adoption, whether the employees' duty to obey it arose from express contract, or by implication from the mere fact of employment and knowledge of the rule. The testimony offered tended to show such disregard of the rule by the brakemen and officers of the company as to make the question of waiver one proper to be submitted to the jury. *Railway Co. v. Baker*, 63 U. S. App. 553, 33 C. C. A. 468, 91 Fed. 224.

The court, over objection, permitted the division superintendent of the defendant, in response to the question whether, if the practice of violating rule 93 were brought to his attention, he would permit it, to answer: "If a man persistently violated that rule, I would order his discharge, if I knew it." This was not a statement of fact pertinent to the issue, but rather a mere expression of opinion, which could be of no legitimate significance in the trial.

Same - Action  
for Injury of  
Servant -  
Evidence.

The important, and, indeed, the controlling, question in the case is that of contributory negligence. Error has not been assigned upon the charge given by the court to the jury, but three requests for special instructions, it is insisted, were improperly refused. We have not made such analysis of these requests as to be able to say that they should or should not have been given. The first and second conclude with a declaration that there had been no contributory negligence, when, perhaps, as in the third, the conclusion should have been left to the determination of the jury. Without passing definitely upon the point, we deem it proper, since the question must arise on another trial of the case, to say that we are unable to see just ground for attributing the injury suffered by the plaintiff in error to his own fault. If he was bound by the rules to be on top of the car, and outside of the cupola, which was

Same - Violation  
of Rules by  
Servant.

above the roof of the car, it was not by any rule directly regulating his conduct, but by inference from the rules prescribing the duties of conductors. He was, by an explicit rule, "under the direction of the conductor at all times when on duty," upon a train. For brakemen this rule, for manifest reasons, had precedence of all others; and when, with the knowledge and acquiescence of the conductor, the plaintiff in error was in the cupola, just as his train approached or was starting up the grade, it is not to be said, as matter of law, that he was there in violation of duty. The conductor's authority to excuse him from remaining at the post of duty is expressly recognized in rule 132, and we cannot agree that nothing less than an express instruction or command of the conductor could justify his presence in the cupola. To say the most, it was a question for the jury. But even if he was wrongfully away from his post, how can it be said that he was thereby guilty of negligence contributing to the injury which

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he suffered? A collision, such as that which happened, was not likely to occur, and in respect to the dangers reasonably to be apprehended the cupola was a safer place than the top of the car. The requirement that brakemen should be on top of the cars was not for their own safety, but rather for the better discharge of their duties upon an emergency. If in Railroad Co.

v. Mansberger, 12 C. C. A. 574, 65 Fed. 196, 24 U. S. App. 551, this court was right in saying that the position of the brakeman on a car, when by the rule then applicable he ought to have been on the ground, "was a mere condition of the injury," and "not the immediate cause of it, in a judicial sense," it is difficult to see how, in a more direct sense, the position of the plaintiff in error in this instance could have been the cause of the injury. For the errors pointed out the judgment is reversed, with direction to grant a new trial.

Same—Contributory Negligence.

MARSHALL

v.

PONTIAC, O. & N. R. Co.

(*Supreme Court of Michigan, Feb. 27, 1901.*)

[85 N. W. 242.]

**Carriers—Loss of Baggage—Liabilities.**—M. purchased a ticket at Detroit over the D., G. H. & M. R. Co., to Pontiac, and from Pontiac to Imlay City over the defendant's railroad. He presented the ticket to the agent of the D., G. H. & M. R. Co., and had his trunk checked to Imlay City. He purchased the ticket for the sole purpose of checking his trunk. He did not intend to go on the train, and did not go, but went by his own private conveyance. His trunk arrived at Imlay City Saturday morning at about 10 o'clock, remaining upon the platform until noon, when the agent put it in the baggage room. Saturday or Sunday night the baggage room was burglarized, and the trunk and contents stolen. *Held*, that M. was not in the position of a *bona fide* passenger; that the defendant was not an ordinary warehouseman, bound to the exercise of that care which the average man takes of his own property, but was a gratuitous bailee, liable only for gross negligence.

Error to circuit court, Laper county; George W. Smith, Judge.

Action by David S. Marshall against the Pontiac, Oxford & Northern Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

The facts in this case appear in the following statement, prepared by defendant's counsel, and given to the jury by the

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court below: "The undisputed facts in this case go to show that on the 11th day of August, 1899, plaintiff purchased a ticket at the office of the Detroit, Grand Haven & Milwaukee Railroad in the city of Detroit over that railroad and the Pontiac, Oxford & Northern Railroad to Imlay City, about 5 o'clock in the afternoon. Knowing that no train left until the next morning, he had his trunk checked for Imlay City, with no intention of going on that train, or accompanying the trunk. The trunk was sent the next morning, and at Pontiac was taken and carried over the defendant's road to Imlay City, arriving there about 10 o'clock the next morning, no one accompanying it. On the arrival of the trunk at Imlay City it was placed upon the platform of the station, and remained there for nearly an hour, at least, until they finally called for it; but, not calling for it, the trunk was placed in the defendant's baggage room, which has been in use as such for several years. This was Saturday, August the 12th. The baggage room was one used by the defendant. There was a window on the east side. This window was fastened down, and some time in the night of August 13th, which was Sunday night, the baggage room was burglariously entered by prying open the door on the west side, pushing the lock aside, by pushing the screws from the casing which held the fastening, feloniously taking and carrying the trunk away, and articles therein in controversy. The windows were not touched or in any way interfered with." Upon this statement the court was requested to direct a verdict for the defendant. This was refused, the court holding, and so instructing the jury, that the following questions of fact were for their determination: (1) Was the room such as is usually used by railway companies for the purpose of taking care of baggage which was uncalled for? (2) Was this particular baggage room such as were the others on the defendant's road? (3) Was the door properly fastened? (4) Was the plaintiff familiar with the construction of or safety of the room as a place of storage? The court also instructed the jury that the defendant's liability as a common carrier had ceased, and that it could be only held liable as a warehouseman; that, as a warehouseman, it was its duty to place the trunk in such a place as a man of ordinary prudence would store his goods in, and that it must be such a place as other railroad companies are in the habit of using under like circumstances. The amount of plaintiff's claim was \$60.50. The jury rendered a verdict for \$40.

Aug. C. Baldwin (A. L. Moore, of counsel), for appellant.  
H. W. Smith, for appellee.

Grant, J. (after stating the facts). It is the well-established rule that the rigorous liability of a railroad company as a common carrier ceases when the passenger's trunk has reached its destination, and been placed upon its platform ready for delivery, and a reasonable opportunity given to take it away.

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After reasonable opportunity has been given the passenger to take it away, the company, according to many authorities, is liable only as warehouseman, bound to the exercise of ordinary care. Was the defendant in this case such a bailee, or a gratuitous bailee, liable only for gross negligence? Plaintiff was not a passenger and did not intend to be a passenger on the train, with his baggage, or for some time thereafter, if ever. He was not a passenger over the defendant's road until more than four months had elapsed. He had not used his ticket when the case was tried in the justice court, but had used it shortly before it was tried in the circuit. Baggage implies a passenger who intends to go upon the train with his baggage, and receive it upon the arrival of the train at the end of the journey. For his own convenience, plaintiff purchased a ticket for the sole purpose of deceiving the railroad company into the belief that he intended to be a passenger, entitled to have carried with him the usual amount of baggage. His contract was that of a passenger. He intended to go to his destination by his private conveyance, and there present his check and obtain his baggage. This he did, and, without having been a passenger, asks the same protection as if he had been one. If he had sold the ticket (which he might have done), to another passenger, he would stand in no different light from that in which he does now. So that the question is presented: May a passenger purchase a ticket, check his baggage, sell the ticket, and then stand in the position of a bona fide passenger upon the road? Counsel cite no authority the parallel of this, and our knowledge of the counsel leads us to conclude that they have made a careful research, and are unable to find any. My own examination of the authorities fails to find a parallel case. The defendant was not in fault in checking the baggage. Its agent, the baggage master, was justified in assuming that the plaintiff intended to accompany his baggage upon the next train. A baggage master has no authority or right to check baggage for any other than a passenger. If, therefore, plaintiff had disclosed to the baggage master the actual situation, he would have been refused a check. In a case of libel against a boat for a loss of baggage the libellant had taken passage on the boat from Antwerp to New York. The vessel left before the arrival at Antwerp of the goods, which consisted of ten packages and one basket, and it became necessary to send them by another vessel. On their arrival two trunks and the basket could not be found. The ground of defense was that the goods were shipped on a passenger ship as personal baggage belonging to the passenger, and, as she did not take passage on board the ship, and pay the fare, which would include compensation for the usual baggage, no compensation was paid, and the ship was entitled to none, and therefore the master was a gratuitous bailee, responsible only for gross negligence. The court held that, where a passenger accompanies his baggage, the fare includes

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compensation for its transportation. If, however, he does not accompany it, the carrier may demand compensation in advance, or upon delivery, relying on his lien or the personal responsibility of the owner. The *Elvira Harbeck*, 2 Blatchf. 336, Fed. Cas. No. 4,424. In *Wilson v. Railway Co.*, 56 Me. 60, it is said, "It is implied in the contract that the baggage and the passenger go together." Redfield says that the receipt and carriage of baggage are incidental to passenger transportation, and that the agents of railroad companies have no authority to receive baggage to carry upon any other basis. 2 Redf. R. R. § 171; Hutch. Carr. § 702. Where a passenger had arrived at her destination, had left the cars, taken her baggage into her possession, and immediately left it in the baggage room for a few hours, it was held that the company was a gratuitous bailee, liable only for gross negligence. *Minor v. Railway Co.*, 19 Wis. 41. See, also, *Hodkinson v. Railway Co.*, 14 Q. B. Div. 228. We must not be understood as holding that it is absolutely necessary for the passenger to go upon the same train with his baggage in order to entitle him to have his baggage taken care of at his destination by the railroad company as a warehouseman. Where the passenger purchased his ticket with the bona fide intention to use it, but, without fault upon his part, did not accompany it, but went upon a following train, a different case is presented. We conclude that plaintiff was not a passenger; that the defendant was a gratuitous bailee, and was not guilty of gross negligence; and that, therefore, plaintiff could not recover. Judgment reversed, and no new trial ordered. The other justices concurred.

## PARKER

v.

## ELMIRA, C. &amp; N. R. CO.

*(Court of Appeals of New York, Jan. 8, 1901.)*

[59 N. E. 81.]

**Statutes—Expression of Subject in Title.**—The regulation of the rate of fare is germane to the subject of an act entitled an act to authorize a railroad to extend its road.

**Same—Repeal.**—General Railroad Law (Laws 1890, c. 565) classifies railroads according to mileage, elevation of grade, date of incorporation, etc., and fixes a maximum rate of fare for each class, and provides that no consolidated railroad shall charge a higher rate on any portion of the consolidated line than was allowed by law to be charged by each existing company thereon before the consolidation. Prior to this enactment a road had been authorized by a special act (Laws 1872, c. 594) to charge four cents per mile, and it was incorporated into another road, which,

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under the general law, was entitled to charge but three cents a mile. The general law contained a schedule of all laws repealed by it, covering 50 years, and enumerated two statutes of the same year as such special act, but made no reference to it. The special act contained a grant from the state, and its repeal would affect the title of the railroad to a portion of its property. *Held*, that the consolidated road was entitled to charge four cents a mile over that portion covered by the special act, which was not repealed by the general law.

**Acquirement of Railroad Franchises by Natural Persons.\***—Though natural persons cannot exercise the franchises conferred by a state on railroads, where they bid in the property of such railroads at foreclosure sale they may hold it, including the franchises, and transmit it intact to a corporation authorized to exercise the franchises.

Appeal from supreme court, appellate division, Third department.

Action by Joseph Parker against the Elmira, Cortland & Northern Railroad Company. From a judgment of the appellate division (49 N. Y. Supp. 1127) affirming a judgment for defendant, plaintiff appeals. Affirmed.

Hull Greenfield, for appellant.

D. W. Van Hoesen, for respondent.

O'Brien, J. This is an action to recover the penalty of \$50, and also 7 cents excessive fare, which it is claimed accrued to the plaintiff under section 39 of the railroad law, which

Case Stated. enacts that "any railroad corporation which shall ask or receive more than the lawful rate of fare, unless such overcharge was made through inadvertence or mistake, not amounting to gross negligence, shall forfeit fifty dollars." The defendant is a railroad corporation created under the statute and by the consolidation and merger in it of various other railroads. It is the result of other and earlier consolidations of small railroads under names slightly different. It claims to be vested with the rights and privileges that any of the railroads which now constitute its entire system possessed by law before they were consolidated and finally merged in the defendant. The legal rate of fare which the defendant was entitled to charge passengers in its cars is three cents per mile, unless, as it contends in this case, it may charge more under some existing special law applicable to one or more branches of the system. On the 25th day of February, 1895, the plaintiff took passage and was a passenger on the defendant's railroad from Freeville to Cortland, and was charged as fare at the rate of nearly four cents per mile; that being the rate usually asked and received from passengers between those stations. The excess paid by the plaintiff beyond what it is claimed was the legal rate between those points was seven cents. The defense to the action was that the defendant had statutory authority for the charge made, and violated no law; but that,

\*See notes at end of case.

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if there was in fact any overcharge, it was made through inadvertence and mistake, not amounting to gross negligence. At the trial the complaint was dismissed, and the plaintiff excepted, and the judgment entered on that decision has been affirmed on appeal.

The case depends largely, if not entirely, upon the question whether a private and local statute known as "Chapter 594 of the Laws of 1872" was validly enacted, and in force at the

Statutes—Ex-  
pression of Sub-  
ject in Title.

date when it is alleged that the overcharge of fare was demanded and received by the defendant from the plaintiff. The title of the act is "An act to authorize the Utica, Ithaca and Elmira Railroad Company to extend their road and to confirm their purchase of a portion of the roadbed of the Lake Ontario, Auburn and New York Railroad and for other purposes." The statute confers various powers upon the Utica, Ithaca & Elmira Railroad Company, and, among other things, by the fifth and last section, to charge a fare not exceeding four cents per mile. That railroad is now a part of the defendant's system by and through various consolidations and mesne conveyances, the proceedings culminating in that result not being questioned in any form, except as to the point which will be referred to hereafter. If that act is still in force, then the defendant had the lawful right to charge the sum demanded and received from the plaintiff. It is attacked, however, on two grounds: (1) On the ground that the act violates that provision of the state constitution which forbids the passage of any private or local bill embracing more than one subject not expressed in the title; (2) that, even if the act was originally valid, it has been repealed by implication in the revision of the statutes which resulted in the present general railroad law. The statute provides for the use and care by the railroad of parts of the general canal system of the state in which the entire public had an interest, but for the purpose of the objection it may be assumed that the act was private and local. We think, however, that the statute contains nothing that is not fairly expressed in the title. An act to extend the road sufficiently expresses in the title everything contained in the five sections. The regulation of the rate of fare which a railroad may charge, and the designation of the maximum per mile, is germane to the subject of the act expressed in the title, which was an act to authorize a designated railroad to extend its road. The extension of the road was the real subject expressed, and all the rest may be regarded as surplusage. The rate of fare which might be charged when the road was extended, as described in the act, was not foreign to the subject expressed in the title, and hence there was no violation of either the letter or the spirit of the constitution. *Astor v. Railway Co.*, 113 N. Y. 93, 20 N. E. 594, 2 L. R. A. 789; *Sweet v. City of Syracuse*, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289; *Perkins v. Heert*, 158 N. Y. 306, 53 N. E. 18, 43 L. R. A. 858.

## Parker v. Elmira, C. &amp; N. R. Co

We do not think that this special act, applicable only to a particular railroad, was repealed by the enactment of the present general law. That law is not general in the sense

**Same—Repeal.** that it provides for a uniform rate of fare applicable to all railroads. It classifies railroads according to mileage, elevation of grade, date of incorporation, and otherwise, and fixes the rate of fare that may be lawfully charged by each class, ranging from ten cents down to two cents per mile (section 37), and then concludes in these words: "Nor shall any consolidated railroad corporation charge a higher rate of fare per passenger per mile, upon any part or portion of the consolidated line, than was allowed by law to be charged by each existing corporation thereon previously to such consolidation." The defendant is a consolidated railroad. That part of its line between Freeville and Cortland was allowed by law to charge four cents per mile, at least prior to the enactment of the general law. The prohibition against charging more would seem to be unnecessary if the lawmakers supposed that it was embraced within the three-cents limitation. The implication is reasonable that on the part of the defendant's line covered by the act of 1872 the maximum rate of fare should not be increased, but could remain as specified in that act. There is no express repeal of the statute, and a repeal by implication is not to be favored. The general rule of construction in such cases is that a special statute, providing for a particular case, or applicable to a particular locality, is not repealed by a general statute, unless the intent to repeal or alter the special law is manifest, although the terms of the general law would, taken strictly, and but for the special law, include the case or cases provided for by it. *Buffalo Cemetery Ass'n v. City of Buffalo*, 118 N. Y. 61, 22 N. E. 962. When, by any reasonable or fair construction, two such enactments can be made to work together, and each can be made to accomplish a different and independent result, a special or local statute will not be affected by a subsequent general law relating to the same subject. In *re Dobson*, 146 N. Y. 357, 40 N. E. 988; *McKenna v. Edmundstone*, 91 N. Y. 231; *Casterton v. Town of Vienna*, 163 N. Y. 368, 57 N. E. 622. When the subsequent general law is a revision of the prior laws, as in this case, the implication of a repeal may be stronger; but here there is affirmative evidence on the face of the general law to show that no repeal was intended. There was attached to the general law, as originally enacted (Laws 1890, c. 565), a schedule of all laws or parts of laws repealed, covering a period of over 50 years; and, although that schedule enumerates two other statutes passed in the same year as the private and local act in question, no reference was made to that act, or any part of it. This is a very clear indication of the purpose of the lawmakers to allow it to remain intact. Moreover, there were very weighty reasons why this local and special statute should have been exempted from any



*Parker v. Elmira, C. & N. R. Co*

express or implied repeal contained in or arising from the enactment of the general law, since it contained what was, in legal effect, a grant by the state to the railroad of the right to use state property, which was formerly a part of the canal system, for a portion of the roadbed, and for the operation of the railroad, upon certain conditions and obligations specified. To repeal the law conferring such rights would be, in effect, to withdraw the grant so far as the state had the power to do so, and thus affect the title of the railroad to a part of its property. The section prescribing the rate of fare was, of course, subject to repeal, but was allowed to stand with the rest of the statute. The legislature evidently intended to avoid any conflict with the constitutional restriction which forbids the enactment of any law impairing the obligation of contracts. This restriction may be violated by the repeal of a law upon which the right or obligation secured by the constitution rests, and which is necessary to the enforcement of the contract or the enjoyment of the property right which it may confer. *People v. Common Council of City of Buffalo*, 140 N. Y. 300, 35 N. E. 485; *McGahey v. Virginia*, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304. It is, therefore, quite clear that the special act authorizing the railroad to charge four cents per mile has not been repealed. That this right was a privilege or franchise in the nature of property which vested in the corporation, and until repealed is entitled to the same protection from invasion as any other species of property, cannot be doubted. *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255; *Beardsley v. Railroad Co.*, 162 N. Y. 230, 56 N. E. 488; *Gilman v. Tucker*, 128 N. Y. 190, 28 N. E. 1040, 13 L. R. A. 304. It was alienable or transferable by mortgage, and passed, with the property, to the purchaser under the judgment in foreclosure, and through the several conveyances and consolidations was transmitted to the defendant. The fact that at the sale of the railroad under the foreclosure judgment in March, 1884, the property was conveyed to two individuals does not affect the right in question, nor interrupt the transmission of the franchise through the successive transfers. Of course, if the franchise to collect fare from the public was lost in that way, there is no reason that I can perceive why all the other franchises should not share the same fate. While it is doubtless true that natural persons cannot exercise the franchises which the state has conferred upon railroad corporations, there is no reason why they cannot be the conduit for transmitting them to another corporation in the manner provided by law. They may bid in the property at the foreclosure sale, including the franchises, and hold and transmit it intact to a corporation authorized to exercise them. Nothing was lost in consequence of the methods used to transmit the title.

**Acquirement of  
Railroad Franchises by Natural  
Persons.**

In view of the conclusion reached concerning the questions discussed, it is quite unnecessary to give construction to that

## Notes

part of the general railroad law which relieves the corporation from liability for the penalty in cases where an overcharge is made through "inadvertence or mistake, not amounting to gross negligence." The learned counsel for the defendant insists that the language employed covers all mistakes not amounting to gross negligence, whether it be a mistake of fact or law. All that is necessary to say now is that, when it becomes important to decide that question, it will not be easy to show that a railroad, when sued for the statutory penalty, can justify the demand and receipt from the public of an unlawful rate of fare upon the plea that it was misinformed with respect to the law, or made a mistake as to its scope and application. It is generally understood, and doubtless true, that railroad corporations have at least as good facilities for acquiring knowledge of the law concerning their rights and duties as private individuals; and no good reason is apparent for exempting them from the general rule, which imputes such knowledge to all. The judgment should be affirmed, with costs.

Parker, C. J., and Bartlett, Haight, Martin, and Vann, JJ., concur. Landon, J., not sitting.

Judgment affirmed.

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NOTES.

**Railroad Franchises—Acquisition by Purchase at Foreclosure Sale.**—When there has been a judicial sale of a railroad property under a mortgage authorized by law, covering its franchises, it is now well settled that the franchises necessary to the use and enjoyment of the railroad passed to the purchasers. *New Orleans, etc., R. Co. v. Delamore*, 114 U. S. 501. The court say: "It follows that if the franchises of a railroad corporation essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property, upon the bankruptcy of the company, carries the franchises, and they may be sold and passed to the purchaser at the bankruptcy sale."

This was also assumed to be the law by the opinion of the court pronounced by MR. JUSTICE MATTHEWS in the case of *Memphis R. Co. v. Commissioners*, 112 U. S. 609, when it was said: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders or the purchasers at a foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it and the franchise of maintaining and operating it as such." See also, *Hall v. Sullivan R. Co.*, 21 Law Rep. 138; *Galveston R. v. Cowdrey*, 11 Wall. (U. S.) 459.

A grant of authority to a railroad company to sell or mortgage "its property and franchises" enables the company to sell or mortgage, not only those rights and franchises which are essential to the use of the property as a railroad, but also those which are incidental without being essential. Thus a purchaser, under a sale of the company's property and franchises pursuant to such authority, would acquire the power of exercising the power of eminent domain to complete the construction of the railroad, and to build branch lines, if that was one of the

## Yazoo &amp; M. V. Ry. Co. v. Wirt Adams

franchises of the company owning the railroad. North Carolina, etc.. R. Co. v. Carolina Cent. R. Co., 83 N. Car. 489; Morawetz Corp. (2d Ed.) § 934.

**Same—Same—Where Purchaser is an Individual.**—The franchises of a railroad corporation which are essential to the operations of the corporation, and without which its roads and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the right of appropriating lands for the construction of necessary appurtenances without which the road could not be successfully operated are transferred, in a marshal's sale of a railroad and all its franchises, to the purchaser, even if he is a natural person. *Lawrence v. Morgan's Louisiana & T. R. & S. Co. (La.)*, 30 Am. & Eng. R. Cas. 309.

The franchises to build or own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights, and may be assigned and enjoyed by an individual; but the franchise to form or be a corporation and act in a corporate capacity is legislative, and not the subject of sale or transfer except by some positive provision of statute law pointing out the mode of transfer. *Ragan et al. v. Aiken (Tenn.)*, 9 Am. & Eng. R. Cas. 201.

In *Hall v. Sullivan R. R. (C. C.)*, 1 Rum. Cal. Cas. 613, the court said in its opinion: "The franchise to be a corporation is not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected. But the franchises to build, own, and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in and being enjoyed by natural persons; and there is nothing in their nature inconsistent with their being assignable."

**Same—Sale under Execution.**—See *Simmons v. Worthington (Mass.)*, 10 Am. & Eng. R. Cas., N. S., and *note*, 774 *et seq.*

YAZOO & MISSISSIPPI VALLEY RAILWAY COMPANY *et al.*, Plffs.  
in Err.,  
v.

## WIRT ADAMS.

(Argued October 22, 23, 1900. Decided January 7, 1901.)

[21 Sup. Ct. 282.]

**Error to State Court—Federal Question.**—The effect of a decision as to liability to taxes for a certain year, as an estoppel in a case respecting taxes of a different year, is not a Federal question which can be reviewed by the Supreme Court of the United States on writ of error to a state court.

**Consolidation of Corporations—Effect on Exemption from Taxation.\***

\*See *Yazoo, etc., R. Co. v. Adams (U. S.)*, *ante*, 1, and extensive *note*, 21 *et seq.*

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—A new grant of corporate franchises, within the meaning of Miss. Const. 1890, § 180, making such grants subject to constitutional provisions which require the property of corporations to be taxed like that of individuals, is made by a subsequent consolidation between railroad companies which had exemptions from taxation prior to the adoption of the new Constitution, but which, by articles of consolidation, agree to merge and consolidate their properties, immunities, and privileges, and substitute for their shares, shares in the new company, although there is a clause in the articles providing that the consolidation shall be effected without disturbing the corporate existence of one of the old companies, "or the formation of any new, distinct corporation, unless such result shall be necessary to give legal effect to this agreement," where the effect of the consolidation was to surrender the entire administration of the functions of the constituent companies to a new corporation with a new corps of officers.

In Error to the Supreme Court of the State of Mississippi to review a decision against a railroad company in an action for taxes from which an exemption was claimed. Affirmed.

See same case below, 77 Miss. 780.

Statement by Mr. Justice Brown:

This was an action against the Yazoo Company and the Illinois Central Company for state, county, municipal, and privilege taxes for the year 1898, upon the property of the Louisville, New Orleans, & Texas Company, which became the property of the Yazoo Company by virtue of the consolidation of October 24, 1892, and has since been operated by the defendants.

Messrs. Wm. D. Guthrie, Edward Mayes, and Noel Gale for plaintiffs in error.

Messrs. R. C. Beckett and F. A. Critz for defendant in error.

Mr. Justice Brown delivered the opinion of the court:

This case does not differ materially from the one just decided (ante, 240), except as to the year for which the taxes were assessed. A joint plea was filed by the defendants setting up a claim to exemption under the charter of the former Louisville Company, which for twenty-five years from March 3, 1882, appropriated all taxes to its construction debts, with a proviso that this appropriation should cease when the profits were sufficient to enable it to declare and pay an annual dividend of 8 per cent. upon the capital stock, over and above the payment of its debts and liabilities. But this plea did not allege that the railroad was built under this charter, nor that the profits had not been sufficient to pay the dividends; and a demurrer was interposed for these reasons, which was sustained by the court.

Defendants then, under leave to answer over, filed two pleas, of which the first, called the amended or second plea, rectified the two foregoing omissions, and set up that this exemption

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was an irrevocable contract of appropriation of the taxes, and protected by the contract clause of the 14th Amendment.

The third plea set up the record and decision in *Natchez, J. & C. R. Co. v. Lambert*, 70 Miss. 779, 13 So. 33, as res judicata, and alleged that the contrary decision of June 20, 1898, in the case of *Adams v. Yazoo & M. Valley R. Co.* was violative of the contract clause. Then followed a maze of replications, rejoinders, and demurrers, into which it would be wholly unprofitable to enter. Suffice it to say that from this "labyrinth of special pleadings," as it was termed by the supreme court (77 Miss. 780), three questions were evolved:

First. Whether the provisions of § 21 of the charter of the Mobile & Northwestern Company constituted a valid and irrevocable contract between the state and the railroad company under the Mississippi Constitution of 1869.

Second. Whether, conceding its validity, the consolidation of 1892 operated to terminate this contract.

Third. Whether the decision in the *Lambert Case* operated as an estoppel against the prosecution of this action.

It is sufficient to say of the third question that it is not Federal in its character. What weight shall be given as an estoppel to a prior judgment of the same court is not a matter which can be reviewed here. We do not understand this point to be pressed.

The second question we have already disposed of in the main case. The immunity from taxation, contained in the charters of the constituent companies, did not inure to the new company formed by the consolidation of 1892.

In the view we have taken of the second question the first becomes immaterial, as we have held in the prior case.

It is stipulated that another case (No. 356) brought against these companies for the taxes of 1898 upon the property of the *Natchez, Jackson, & Columbus* division of the *Louisville Company*, now owned and operated by the *Yazoo Company*, shall abide the result of this.

The judgment of the Supreme Court of Mississippi in these cases is therefore affirmed.

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VAN INWEGEN

v.

PORT JERVIS, M. & N. Y. R. Co.

(Two Cases.)

(Court of Appeals of New York, Dec. 21, 1900.)

[58 N. E. 878.]

**Negligence—Fire on Railroad Right of Way—Spread—Proximate Cause.\***—Where plaintiff's evidence, in an action for the destruction of property on his premises by a fire negligently started on defendant's

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\*See monographic note, 15 Am. & Eng. R. Cas., N. S., 495 et seq.

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land, showed that lands of other owners intervened between plaintiff's land and the origin of the fire, defendant's motion for a nonsuit was improperly refused, since, as matter of law, the fire started on defendant's land was not the proximate cause of the injury.

Appeals from supreme court, appellate division, Second department.

Actions by Charles A. Van Inwegen against the Port Jervis, Monticello & New York Railroad Company. From judgments of the appellate division (53 N. Y. Supp. 1025) affirming judgments in favor of plaintiff, defendant appeals. Reversed.

Action No. 1 was brought to recover damages for the destruction by fire of standing timber and fences, and action No. 2 was brought to recover damages for the destruction by the same fire of 200 cords of cut wood upon the premises of the plaintiff.

Henry Bacon, for appellant.

C. E. Cuddeback, for respondent.

Werner, J. This case cannot be distinguished from Hoffman v. King, 160 N. Y. 618, 55 N. E. 401, 46 L. R. A. 672. In that case, as in this, it appeared that there were intervening owners between the lands of the plaintiff and the defendant. There being no dispute as to this essential fact, the question whether the fire which was started upon the premises of the defendant was the proximate cause of the injury to the plaintiff's lands is a question of law for the court, and not a question of fact for the jury. This question was in this case submitted to the jury after the denial of defendant's motions to dismiss at the end of plaintiff's case and at the close of the whole case. The question was further raised by appropriate requests to charge preferred by defendant's counsel. Under the circumstances, there is nothing to do but to follow the decision in Hoffman v. King, supra, upon the authority of which the judgments herein are reversed, and new trials granted, with costs to abide the event.

Parker, C. J., and Gray, O'Brien, Haight, and Landon, JJ., concur. Cullen, J., not sitting.

Judgments reversed, etc.

## VANDERCOOK

v.

DETROIT, G. R. & W. R. Co.

(*Supreme Court of Michigan, Dec. 31, 1900.*)

[81 N. W. 616.]

**Carriers—Injury to Passengers—Proximate Cause.\*—Plaintiff was a**

\*As to what constitutes the proximate cause of an injury, see generally, Chicago C. W. Ry. Co. v. Price (C. C. A.), 16 Am. & Eng. R. Cas., N. S., 324, and *foot-note*; monographic note by Mr. William Wirt Howe, 1 Am. & Eng. R. Cas., N. S., xix *et seq.*

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passenger over defendant's road. On approaching Lansing, in the night, the train ran into some flat cars standing on the Michigan Central track, 60 rods from the depot. The train was running so slowly that the plaintiff supposed it had reached and stopped at the depot. He soon ascertained that an accident had occurred. He remained in the car from 5 to 10 minutes, and then followed other passengers across a flat car, which stood close alongside the coach. The passengers stepped from the coach onto the flat car, and jumped to the ground to go to the depot or to their homes. Plaintiff walked across the flat car, and, in jumping from it, caught the toe of his shoe in a stake hole, and fell. *Held*, that the collision with the train of flat cars was not the proximate cause of the injury.

Error to circuit court, Ingham county; Rollin H. Person, Judge.

Action by Willis Vandercook against the Detroit, Grand Rapids & Western Railroad Company. Verdict for plaintiff. Defendant appeals. Reversed.

Plaintiff, on the evening of December 24, 1897, was a passenger over the defendant's road from Plymouth, Wayne county, to Lansing. The train was due in Lansing at 9 o'clock, and was a few minutes late. The tracks of the defendant and the Michigan Central united about 60 rods east of the depot at Lansing, and formed what is known as a "Y." Trains on either road were required to come to a stop upon approaching the Y, unless a certain signal indicated that the track was clear. The defendant's train approached the Y without stopping, and ran into a train of flat cars standing upon the track of the Michigan Central. The defendant's train was moving very slowly, and plaintiff testified that the jar was no greater than is common when the train is stopped by the application of the brakes. He supposed that the train had reached the depot. He remained in the car from 5 to 10 minutes, and then stepped from the car onto a flat car, which stood even with the steps of the coach and close to it, for the purpose of leaving the train to go up to the depot. Other passengers had preceded him, and had safely alighted. He stopped a little in his preparation to jump from the flat car, caught the toe of his foot in a stake hole of the flat car, and fell forward, injuring his arm. He testified: "The reason why I got off where I did was that there was a light there. A man stood there with a lantern that I took to be a railroad man, asking us to get off there. I could not tell what kind of a looking man he was, whether large or small. It was too dark. I thought he was a railroad man because he had a lantern." The jury found a verdict for the plaintiff.

R. A. Montgomery, for appellant.  
Smith & Hood, for appellee.

Grant, J. (after stating the facts). The negligence of the defendant, through its engineer, in running into the train upon

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the Michigan Central, is conceded. The question in the case is this: Was that the proximate cause of the injury to plaintiff? Plaintiff's counsel seek to bring the case within the rule stated in Shear. & R. Neg. § 26: "The proximate cause of an injury must be understood to be that which is a natural and continuous sequence, unbroken by any new independent cause producing that event, and without which that event would not have occurred." They cite the following authorities: *Jensen v. The Joseph B. Thomas* (D. C.) 81 Fed. 578; *Railroad Co. v. Hedge*, 44 Neb. 448, 62 N. W. 887; *Halstead v. Village of Warsaw* (Sup.) 59 N. Y. Supp. 518; *Phillip v. Railroad Co.*, 127 N. Y. 657, 27 N. E. 978; *Schemerhorn v. Railroad Co.* (Sup.) 53 N. Y. Supp. 279. In *Jensen v. The Joseph B. Thomas*, plaintiff was at work in the hold of the vessel. The hatch covers were piled up by the side of the hatchway under which plaintiff was at work. A freshly-painted keg was placed upon the hatch covers to dry. Some one stepped upon the hatch covers, by means of which the keg was thrown into the hatchway, and fell upon the plaintiff. In *Railroad Co. v. Hedge*, plaintiff jumped from a moving train in order to escape a threatened collision with a runaway freight car, due to the negligence of the defendant. In *Halstead v. Village of Warsaw*, the defendant had been using a steam roller upon the street, and left it by the side of the street, which was only three rods wide. The roller left a space of about two rods for the teams to pass. The horse, an ordinarily gentle one, shied. The driver, plaintiff's husband, suddenly pulled upon the reins, and the bit broke. In *Phillips v. Railroad Co.*, plaintiff was crossing a railroad with his horse and buggy. There were gates on each side to prevent travelers entering upon the approach of trains. The buggy passed through the west gate without interruption, and, as he was passing under the east gate, the gate keeper lowered the gate so as to strike the horse, and one of the lines broke. The horse turned suddenly, and upset the buggy. In *Schemerhorn v. Railroad Co.*, defendant failed to give the crossing whistles until within 500 feet of the crossing, when three piercing shrieks of the whistle frightened the horse,—an ordinarily gentle one,—and he became unmanageable, and carried the decedent in front of the train. It will be readily seen that these cases are not in point. The original cause, and the alleged proximate cause, were simultaneous. In each the injured party had not time to deliberately choose his course of action, while in most of the cases he was compelled by the situation to act as he did. In this case no injury resulted from the collision. Plaintiff was entirely safe and unhurt, and could have remained on board the train had he chosen to do so. No negligence is charged in failing to afford a safe place in which to alight. Undoubtedly the plaintiff's fall was not attributable to the negligence of any one. It was one of those accidents for which no one was to blame. Several others had alighted in safety. The passengers going beyond Lansing remained in



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the car. Plaintiff's home was at Mason, and he intended to take a train on the Michigan Central the same evening for his home. The Michigan Central train could not go until the track was cleared and the defendant's train had pulled up to the depot.

Under plaintiff's contention, defendant would be liable for any accident resulting to him from the time he left the car until he reached the depot, provided he was himself without negligence. If he had stumbled over the end of a tie or other obstruction, the defendant would be liable. If he had remained in the car for half an hour or more, instead of 10 minutes, and then concluded to go to the depot, the defendant would be liable. So, too, if a traveler on a highway found a bridge unsafe to cross, and attempted to ford the stream, or get across by some other means, a municipality would be liable. In *Lewis v. Railway Co.*, 54 Mich. 55, 19 N. W. 744, the defendant was held to be negligent in carrying the plaintiff beyond the station, and giving him erroneous information as to where he was. After alighting he soon discovered that he was south of the cross-road he intended to take, instead of north of it, as he was told when he alighted. If he had landed where he was told he had, he had meant to follow the track south to the road, and pick his way across the culvert, though he might have shunned it by taking a side path. In approaching the road from the south, he determined to cross the other culvert in the same way. On nearing the cattle guard, his eye deceived him, his foot slipped, and he fell into the culvert. It was held that the negligence of the defendant, in carrying him past the station and in giving him erroneous information as to the exact locality where he alighted, was not the proximate cause of the injury. The question of proximate cause is there thoroughly discussed, and many authorities cited and commented upon by Chief Justice Cooley, in an opinion concurred in by the entire court. We are of the opinion that that case controls, and that the court should have directed a verdict for the defendant. Judgment reversed, and no new trial ordered. The other justices concurred.

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BOSTON & M. R. R.

v.

SULLIVAN *et al.**(Supreme Judicial Court of Massachusetts, Dec. 8, 1900.)*

[58 N. E. 689.]

**Station Grounds—Sale of Exclusive Privileges to Hackmen—Continuing Trespass by Other Hackmen—Right to Enjoin.\*—Where hackmen, who had been permitted by a railroad company to enter its station**

\*As to whether exclusive privileges at stations to local carriers may be granted, see *Boston & A. R. Co. v. Brown* (Mass.), 19 Am. & Eng. R. Cas. 304, and *note*, 307.

grounds to solicit passengers and baggage, continued to trespass on such grounds after notice to cease, for the reason that the company had sold the exclusive privilege to another, and such trespassing hackmen did not deny plaintiff's title to the property or claim any right of way over the same, the company was entitled to an injunction restraining the continuance of such trespasses, since resort to actions at law would occasion a multiplicity of suits, every trespass constituting a new cause of action.

**Continuing Trespass—Injunction—Equity Jurisdiction—Statute.**—Under Pub. St. c. 151, § 4, declaring that the supreme judicial court shall have general equity jurisdiction, such court has power to grant an injunction restraining a continuing trespass; such relief being within the court's general equity jurisdiction to prevent a multiplicity of suits.

**Station Grounds—Trespasses by Hackmen—Sufficiency of Bill to Enjoin.**—A bill by a carrier to restrain hackmen from entering its station grounds to solicit passengers and baggage, after notice not to do so, is not demurrable for failure to allege that plaintiff has been injured by such trespasses, since damage is the necessary result thereof.

**Same—Same—Injunction—Defenses.**—Where a carrier, after having sold the exclusive privilege of entering its depot grounds for the purpose of soliciting passengers and baggage, notified defendants, who were hackmen and baggagemen, not to enter its depot grounds for such purpose, the fact that the person to whom the privilege was sold was not a duly-licensed hackman in accordance with the city ordinance was no defense to a bill by the carrier for an injunction restraining such hackmen from entering its premises.

Report from supreme judicial court, Essex county.

Plaintiff, the Boston & Maine Railroad, was the owner in fee of premises used for its passenger station and depot grounds, and for a long time had permitted defendants, who were hackmen and baggagemen, to enter such grounds for the purpose of soliciting passenger and baggage business. Plaintiff, having sold the exclusive privilege of soliciting passengers and baggage on its premises to another, notified defendants of such fact, and that they would not thereafter be permitted to solicit passengers and baggage on the company's premises. Defendants ignored such notice and continued to enter the station to solicit passengers and baggage, whereupon plaintiff brought this bill against defendants Michael Sullivan and others to restrain them from further trespassing on its property and soliciting business. On demurrer to the bill. Case reported to the supreme judicial court for determination. Demurrer overruled and injunction granted.

De Courcy, Coulson & Cox, for plaintiff.

J. P. Sweeney and H. R. Dow, for defendants.

Lathrop, J. There can be no doubt that the defendants illegally trespassed upon the plaintiff's land, and this was practically conceded at the argument. *Railroad Co. v. Tripp*,

147 Mass. 35, 17 N. E. 89; *Railroad Co. v. Brown* (Mass.) 58 N. E. 189. The only question of importance, then, is whether the plaintiff should have resorted to an action at law, as was done in the two cases cited, or whether it is also entitled to maintain a bill in equity. The facts show that the defendants have been guilty of trespasses, which they propose to continue. The ownership of the plaintiff is admitted, and no question of title is involved. Nor is any claim to a right of way over the plaintiff's land set up in the answer of the defendants. It seems to us clear that the bill in this case may be maintained. If the plaintiff were to sue at law, the amount recoverable could not be large, in comparison with the amount expended in litigation, and every trespass would give a new right of action. Hence there would arise a great multiplicity of suits. At some time the plaintiff would be entitled to the protection of a court of equity, and there is no reason why, on the facts of this case, the remedy by injunction should not be granted at once. This court has now full jurisdiction in equity, and can put in force the remedies appropriate to that jurisdiction. The language of Sir W. M. James, L. J., in the case of *Goodson v. Richardson*, 9 Ch. App. 221, 226, is very appropriate to this case: "The defendant in this case is admittedly a trespasser. He has committed a trespass upon the plaintiff's land without any legal justification or any legal excuse whatever, and he proposes to continue that trespass from day to day, \* \* \* for the purpose of making profit of a trade which he proposes to set up in rivalry to a trade which the owner of the land upon which he is so committing the trespass is interested in. It is said that we ought to allow this to be done; that we ought, in fact, to dismiss the plaintiff from this court, and tell him to find his way to another court, in which he is to bring an action for the wrong, for which there is no defense whatever. He is to bring that action at his own cost, and, having succeeded in one action, he is to bring a second (I do not know whether more than one will be required); and then, having succeeded in one action, or two actions, or perhaps three actions, all of which, on the facts proved in this case, would necessarily result in verdicts for him, he is to come back to his court and obtain a perpetual injunction, on the ground of repeated vexation and repeated action. I do not think there is any principle in this court which will compel us to drive the plaintiff to go through all that litigation before he is entitled to that relief which he would ultimately get when he had gone through it." In the same case it was said by Lord Chancellor Selborne: "I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the consent of the owner of the land; and it appears to me, as such, to be a proper subject for an injunc-

tion." See, also, *Allen v. Martin*, L. R. 20 Eq. 462; *Lembeck v. Nye*, 47 Ohio St. 336, 24 N. E. 686, 8 L. R. A. 578; *Warren Mills v. New Orleans Seed Co.*, 65 Miss. 391, 4 South. 298; *Emigration Co. v. Gallegos*, 32 C. C. A. 470, 89 Fed. 769, 773; *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146, 161, 36 Atl. 1107; *Musselman v. Marquis*, 1 Bush, 463; *Ellis v. Wren*, 84 Ky. 254, 1 S. W. 440; 3 Pom. Eq. Jur. § 1357; 1 Spell. Extr. Relief, § 342; 1 Beach, Inj. § 523. The case at bar is distinguishable from *Washburn v. Miller*, 117 Mass. 376. There a question arose as to the plaintiff's right to the way in question, as against the defendant. Here no question of title arises. There the trespasses had been committed, and were not continuing trespasses. Here the trespasses are continuing. It is also to be noticed that that case was decided in 1875, when Gen. St. c. 113, was in force. Section 2 of that chapter, after setting forth certain cases in which the court should have jurisdiction, and not mentioning trespasses, concluded as follows: "And shall have full equity jurisdiction, according to the usage and practice of courts of equity, in all other cases, where there is not a plain, adequate and complete remedy at law." This clause was repealed by St. 1877, c. 178, § 2, and a much broader law enacted. This gives to this court "jurisdiction in equity of all cases and matters of equity, cognizable under the general principles of equity jurisdiction"; and it is further declared, "and in respect of all such cases and matters, shall be a court of general equity jurisdiction." See Pub. St. c. 151, § 4. The cases we have cited above and the text writers show that a court having general equity powers may issue an injunction in a case like the present, where the trespasses are continuing. The fact that the defendant is solvent in such a case is not of importance, although his insolvency may be an additional reason for sustaining the jurisdiction. The bill in this case sets forth all the facts necessary to give the court jurisdiction. Damage to the plaintiff is the necessary result of the facts set forth, and when that appears it is no ground of demurrer that the bill does not set forth that the plaintiff has been injured. 2 Beach, Inj. § 1397.

The only other defense relied upon is that the person with whom the plaintiff made the contract was not duly licensed in accordance with an ordinance of the city of Lawrence. Some question is made as to the validity of this ordinance, but we do not deem it necessary to consider this point, as we are of opinion that, if the facts are as the defendants contend, they afford no excuse for their trespasses. The result is that the demurrer should be overruled, and an injunction issue. So ordered.

SOUTHERN RY. CO. *et al.*

v.

## COMMONWEALTH.

*(Supreme Court of Appeals of Virginia, Dec. 6, 1900.)*

[37 S. E. 294.]

**Connecting Carriers—Statutory Duty to Connect—Proceedings to Enforce—Parties.**—Act March 3, 1892, § 14 (Acts 1891–92, p. 965), authorizes the railroad commissioner to commence proceedings against any carrier which fails to make connections with other railroads, after the commissioner has requested such roads to make such connections. Two connecting railroads failed to make connections, and, on the receipt of a request from the railroad commissioner suggesting the changes in time which the company should make, the S. Co. complied therewith, but the B. Co. refused to adopt such time card. *Held*, that the S. Co. was a proper party to proceedings to require the roads to make proper connections, though it had complied with the request of the commissioner, since all the parties should be before the court, so that all the matters in dispute could be determined, and a judgment binding on both corporations be rendered.

**Same—Same—Violation.**—Act March 3, 1892, § 4, requires common carriers to afford all reasonable, proper, and equal facilities for traffic between their respective lines, and for receiving, forwarding, and delivering passengers and property to and from their several lines and connecting lines. *Held*, that a railroad so changing its time card by which a connection with a connecting road, which is of general convenience, is discontinued, in order to furnish better facilities to several towns, was in violation of the statute.

**Judgment.**—A judgment in proceedings under Act March 3, 1892, authorizing the circuit court to order connecting railroad lines to make connections, which fixes a schedule for certain connecting trains, to be in effect if the companies fail to agree on a schedule making a desired connection, is erroneous, unless it provides that the connecting roads may afterwards agree on a new schedule, not in conflict with the law.

Appeal from circuit court, Shenandoah county.

Proceedings by the commonwealth against the Southern Railway Company and the Baltimore & Ohio Railroad Company to compel the defendants to make connections at a certain connecting point. From an order requiring the defendants to make the connections, and fixing a time card therefor, they appeal. Modified and affirmed.

Eppa Hunton, Jr., for appellants.

The Attorney General, James H. Williams, R. M. Ward, and James Bumgardner, Jr., for the Commonwealth.

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Buchanan, J. This is a proceeding under section 14 of an act approved March 3, 1892, entitled "An act to further regulate and control common carriers doing business in this state and further defining the duties of the railroad commissioner in relation thereto." Acts 1891-92,

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p. 965. That section provides that "whenever upon complaint made to the railroad commissioner or from his own knowledge, and after he has given the common carrier complained of reasonable notice and an opportunity to be heard and has fully investigated the complaint, it shall appear to said commissioner that any common carrier doing business in this state has failed or neglected in any respect or particular to comply with the provisions of this act or with any of the laws of this commonwealth relating to the transportation of freight and passengers by common carriers, especially in regard to connections with other railroads, the rates of toll and the time schedule, he shall, in writing, request the said common carrier, or person operating the company, to correct the cause of complaint. If after ten days the said company neglects or refuses, the said commissioner shall, in the name of the commonwealth, proceed to have all matters or cause of complaint adjusted by the circuit court, or the judge thereof in vacation, of the county or city wherein the cause of complaint arose, having first given said common carrier, or person operating the company, ten days' notice, which notice shall contain the cause of complaint. The case shall be heard by the said circuit court, or the judge thereof in vacation, on said notice, and no other pleading shall be required. The said court or judge, if its decision is in favor of the commonwealth, shall by mandatory or restraining order, prevent the common carrier or person complained of from further continuing to violate the law."

The object of the proceeding was to compel the Baltimore & Ohio Railroad Company and the Southern Railway Company to re-establish a connection between passenger train No. 14 of the former road and train No. 36 (now No. 12) of the latter road, at Strasburg Junction, which had been made by their trains prior to December 10, 1899.

Upon complaint being made to the railroad commissioner, he, after giving notice to the railroad companies, investigated the complaint, and reached the conclusion that it was the duty of these companies to restore the connection, and suggested what ought to be done by each company to accomplish that end. The Southern Railway accepted his suggestion, and changed the schedule of its train. The Baltimore & Ohio Railroad Company declined to comply with his suggestion, and continued to run its train as before. Thereupon the railroad commissioner, in the name of the commonwealth, gave notice to both railroad companies (reciting in the notice the proceedings had before him and the action of each company in reference thereto) that he would move the circuit court of

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Shenandoah county "to adjust said complaint, and all matters and cause of complaint in connection therewith," and that he would "ask the court to require that the said Baltimore & Ohio Railroad Company \* \* \* should hold said train No. 14 \* \* \* at Strasburg Junction for connection with said train No. 36 (now No. 12) of the Southern Railway Company, and that the schedule of the Baltimore & Ohio Railroad Company \* \* \* shall be changed in conformity thereto."

When the case came on to be heard in the circuit court, the Southern Railway Company asked that the proceeding against it be dismissed, on the ground that it appeared that it had arranged its schedule in accordance with the request of the railroad commissioner. The court overruled its motion, and that action of the court is assigned as error.

The counsel of the Southern Railway insists that, inasmuch as that company had complied with the request of the railroad commissioner, there was no cause of complaint against it, and therefore it ought not to have been impleaded. This would be true if the circuit courts were made merely ministerial agencies to enforce the requests or suggestions of the commissioner.

But this was not, as is conceded, the intention of the legislature. The commissioner is charged with the duty of investigating the failure or neglect of common carriers to comply with the laws of the commonwealth relating to the transportation of freight and passengers, whether such failure or neglect be within his own knowledge or be brought to his attention by complaint made to him. After giving the offending carrier or carriers an opportunity to be heard, if upon full investigation he ascertains that there is a violation of such laws, it is his duty to request the carrier or carriers, as the case may be, to correct the cause of complaint, and, if it be not done in 10 days, it becomes his duty, in the name of the commonwealth, to bring the matter before the circuit court, that it may adjust "all matters or cause of complaint." The "all matters or cause of complaint" referred to is not the failure or refusal of one or the other of the carriers to comply with the commissioner's request, but their failure to correct the cause of complaint. The proceedings before the commissioner, and his inability to have the cause of complaint corrected, are conditions precedent to the exercise of the jurisdiction conferred upon the circuit court. When its jurisdiction is invoked and attaches, it must investigate the cause of complaint, after notice to the party or parties who are charged with violating the law, and when this has been done, and its decision is in favor of the commonwealth, it must put an end to such violation by a mandatory or restraining order. In order to perform this duty, it must, of necessity, have the parties charged with violating the law before it, and not merely the party which has declined to comply with the commissioner's request. The court must hear the case de novo.

Connecting Carriers—Statutory Duty to Connect—Proceedings to Enforce—Parties.

How can this be done without notice to the parties charged with violating the law? In a case like that under consideration, where the complaint is that two railroad companies ought to make connection, but do not, how is the court to investigate the matter, and enforce its order, if one of the carriers is not before the court?

The language of the act, as it seems to me, requires that all the parties charged with violating the law, and who were parties to the proceeding before the commissioner, must be parties to the proceeding in the circuit court; but, if the language of the act does not expressly require this, there is another and a conclusive reason why they should be parties, and that is that the court cannot in this proceeding perform the duties imposed upon it without having before it the parties charged with violating the law, so that they may be heard, and the orders of the court be made effective.

Prior to December 10, 1899, the Southern Railway ran a morning train from Washington to Manassas Junction, on its main line, and from there over a branch line to Harrisonburg. This train (No. 9) left Washington at 8:01 a. m., reaching Strasburg Junction at 12:25 p. m., and arriving at Harrisonburg at 2:00 p. m. Train No. 12 left Harrisonburg at 3:10 p. m. for Strasburg Junction, arriving there at 5:08 p. m., and reaching Manassas at 8:32 p. m., making connection with its main-line train, which reached Washington at 9:40 p. m.

The Baltimore & Ohio Railroad ran a morning train from Harper's Ferry to Strasburg Junction, leaving the Ferry at 10:40 a. m., after the arrival there of its main-line train from Baltimore and Washington, making close connection at Strasburg Junction with train No. 9 of the Southern, which reached there, as before stated, at 12:25 p. m. This train (No. 14) of the Baltimore & Ohio was held at Strasburg Junction until after the arrival of the east-bound train (No. 12) of the Southern, at 5:08 p. m., leaving there on its return at 5:15 p. m., and arriving at Harper's Ferry at 7:05 p. m., making connection with its main-line train from the west.

This schedule gives passengers from Washington City, having business in the valley of Virginia south of Strasburg Junction, the choice of routes, and enables them to return the same day by either route. Travel originating at Harper's Ferry, and at points between there and Strasburg Junction, was enabled to go as far south as Harrisonburg and return the same day to the point of departure. By it the delivery of mail and the shipment of express were expedited. This schedule seems to have been generally satisfactory to the public and to the sections tributary to each road, except to the people between Strasburg Junction and Harrisonburg and the business people of the last-named place. They were dissatisfied with the schedule, because it did not give a longer interval between the arrival of train No. 9 and the departure of train No. 12, so as to give better

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facilities to the people of Harrisonburg to receive their morning's mail by train No. 9, and to answer it by train No. 12, and also to allow the people going to Harrisonburg a longer time in which to transact their business.

To remove the complaint, it seems, the Southern Railway changed its schedule on the 10th of December, 1899, so that train No. 12 left Harrisonburg at 3:40 instead of 3:10 p. m. Under that schedule, train No. 12 did not reach Strasburg Junction until 5:40 p. m., 25 minutes after the leaving time of the Baltimore & Ohio train No. 14, thus breaking the connection which had theretofore been made, and compelling passengers for points north of Strasburg Junction on the Baltimore & Ohio road and its connections to lie over at Strasburg Junction until 10:50 that evening for a freight train which carried passengers, and which was generally behind time, or until 8:20 the next morning, the leaving time of the north-bound passenger train. This action of the railroad companies in breaking the connection of trains Nos. 12 and 14 at Strasburg Junction, and their failure or refusal to restore the connection under the old or any other schedule, was, we think, under the facts of this case, a violation of section 4 of the said act of March 3, 1892, which is as follows:

"Sec. 4. All common carriers subject to the provisions of this act shall, according to their respective powers, and with due regard to the exigencies of their other traffic, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to establish or maintain unremunerative train service, or to give the use of its tracks or terminal facilities to another carrier engaged in a like business."

It was not a matter of serious consequence to the public whether the connection under consideration was made a little earlier or a little later in the day, but it was a matter of moment to them that it should be made, and the railroad companies ought to have agreed upon a connection that would have been fair and just to the public and the localities to be accommodated by them, and which at the same time would best subserve their own interests.

The circuit court, being of opinion that the connection in question ought to be made, ordered the railroad companies, respectively, to arrange the schedules of trains Nos. 12 and 14,

**Judgments.** within 15 days after the adjournment of the court, so that they would connect at Strasburg Junction, and, if they failed within that time to agree upon a proper schedule, it enjoined the Southern Railway Company from making the time of the arrival of train No. 12 at Strasburg Junction later than 5:22 p. m., and enjoined the Baltimore

## Blackstone v. Central of Georgia Ry. Co

& Ohio Railroad Company from making the departure of its train No. 14 from that junction earlier than should be necessary for the proper transfer of passengers and traffic from train No. 12 to train No. 14; thus requiring the Southern to bring its train No. 12 to Strasburg Junction at least 18 minutes earlier than its schedule time, and the Baltimore & Ohio to hold its train No. 14 at the junction from 12 to 14 minutes (which includes time for transferring passengers and traffic from train No. 12) after its schedule time for leaving. Under the court's order, train No. 12, leaving Harrisonburg on its schedule time, would have 1 hour and 42 minutes to run to Strasburg Junction, a distance of 49 1-5 miles, and train No. 14 could reach Harper's Ferry on its schedule time by running 51 miles in about 1 hour and 38 minutes, and each would be enabled to make its regular connection with its main line. There were doubtless some inconveniences to both roads and their patrons resulting from this change of schedules, but under all the circumstances of the case, without discussing them further, we cannot say that the circuit court did not properly perform the delicate and difficult duty imposed upon it, or that its order is erroneous, except in so far as it failed to provide that the railroads might, after the court's change in the schedule went into effect, agree upon a new schedule, not in violation of law, and that either road, in the absence of such new schedule, might, after reasonable notice to the other and to the attorney for the commonwealth for Shenandoah county, apply to the court or judge in vacation for such modification in its order of January 25, 1900, as it might show to be proper.

The order of the circuit court in these respects will be amended, and as amended affirmed.

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BLACKSTONE

v.

## CENTRAL OF GEORGIA RY. CO.

*(Supreme Court of Georgia, Feb. 25, 1901.)*

[38 S. E. 79.]

**Injury to Employee—Contributory Negligence.**\*—Upon the trial of an action for damages against a railroad company, it appeared that the plaintiff was injured by being knocked from a moving train in the yard of the defendant by an electric light pole which was erected too near the track; that the plaintiff was a yard master in the employ of the defendant; and that not only were his duties as yard master and his

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\*See *Phelps v. Chicago, etc., Ry. Co.* (Mich.), 16 Am. & Eng. R. Cas., N. S., 302, and *foot-note*.

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familiarity with the yard such as to charge him with knowledge of the location of the pole, but there was evidence tending to show that he had actual knowledge of its location. *Held*, that the plaintiff was not entitled to recover, and a nonsuit was properly awarded in the case. See *Railway Co. v. Head*, 18 S. E. 976, 92 Ga. 723; *Walker v. Railroad Co.*, 30 S. E. 503, 103 Ga. 820 (1); *Blackstone v. Railway Co.*, 31 S. E. 90, 105 Ga. 381, 383.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action by H. F. Blackstone against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Henry C. Roney, for plaintiff in error.

Jas. C. C. Black, for defendant in error.

Per Curiam. Judgment affirmed.

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## LUCAS

v.

BURLINGTON, C. R. & N. RY. CO.

(*Supreme Court of Iowa, Dec. 22, 1900.*)

[84 N. W. 673.]

**Carriers of Freight—Liability—Limitation—Fraud.\***—The limitation, in contract of shipment of a horse, of the carrier's liability to \$100, the "released value of the horse" named in the contract, rendering the contract void, under Code, § 2074, providing no contract shall exempt a railway from liability of a common carrier which would exist had no contract been made, fraud of the shipper in making representations to secure a cheaper rate of freight will not prevent his proving the full value of the horse.

Appeal from district court, Johnson county; M. J. Wade, Judge.

Action to recover for injuries to a horse shipped over the defendant's road. There was a trial to a jury, and a verdict for the plaintiff for \$2,500. On a motion for a new trial, the court required the plaintiff to remit \$700 of this amount or submit thereto. The plaintiff filed a remittitur, but excepted

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\*As to validity contract limiting value of article shipped, see generally, *notes*, 13 Am. & Eng. R. Cas., N. S., 168 *et seq.*; *Ward v. Missouri Pac. Ry. Co. (Mo.)*, 30 Am. & Eng. R. Cas., N. S., 30, and *foot-note*.

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to the order. Judgment was thereupon rendered for the plaintiff for \$1,800. Both parties appeal. Affirmed.

A. E. Swisher and S. K. Tracy, for appellant.

Ranck & Bradley and O. A. Byington, for appellee.

Sherwin, J. The horse alleged to have been injured is a pacing stallion, "Larry Ginter" by name. He was shipped from Iowa City, Iowa, to Cedar Rapids, Iowa, over the defendant's road, and injured while in the car in the yards at the latter place. When presented for shipment, the plaintiff was asked by the defendant's agent whether it was a "horse or a stallion." He answered that it "was a horse,—a common horse." The rate for shipping stallions was higher than for geldings or mares, and in its answer the defendant pleaded false and fraudulent representation by the plaintiff as to the sex and value of the horse, for the purpose of securing a cheaper rate of freight. The court below instructed the jury to disregard this defense. The defendant challenges the instruction, and contends that the plaintiff is limited in his recovery to the amount of \$100, which was the "released value of the horse" named in the contract of shipment. The instruction was correct. Under section 2074 of the Code, the contract was void. *Brush v. Railroad Co.*, 43 Iowa, 554; *McCune v. Railway Co.*, 52 Iowa, 602, 3 N. W. 615; *Davis v. Railway Co.*, 83 Iowa, 744, 49 N. W. 77. Nor could any representations which the plaintiff might make, however false or fraudulent, give it vitality. If fraud was practiced by the plaintiff to secure a cheaper rate of freight, the defendant would not be bound by the rate given, but a void contract procured thereby could by no possible means lessen its liability.

The appellant urges that the judgment is excessive, and the plaintiff urges that the court should have given him judgment for the amount found by the jury. We are not disposed to disturb the action of the court in this matter. There is evidence tending to support the verdict, but the value of property of this kind is not well fixed. It depends very largely upon the fancy of individuals, and is to a certain extent speculative. It is true, as stated by the appellant, the stallion has an "elongated pedigree"; but whether "it made him sag to carry it," and was the cause of his "nervousness and unreliability," and whether his legs were puffed on account thereof, as suggested by appellant, were questions peculiarly for the jury, and not for this court. The pedigree was in evidence, and we understand the jury personally visited this son of illustrious sires and dams. This being so, we should not interfere with the finding that he was injured. The criticism of the other instructions given by the court is without merit. When read as a whole, the jury could not have misunderstood them. The instructions asked by the defendant were properly refused. The judgment is affirmed on both appeals. Affirmed.

Morris' Adm'r v. Louisville & N. R. Co

MORRIS' ADM'R

v.

LOUISVILLE & N. R. Co.

(*Court of Appeals of Kentucky, Feb. 27, 1901.*)

[61 S. W. 41.]

**Peremptory Instruction.**—The giving of a peremptory instruction for defendant, where there is no evidence tending to show a right of recovery on the part of plaintiff, does not deprive plaintiff of his constitutional right of a trial by jury.

**Same.**—Where the facts are undisputed, and there is no room for honest difference of opinion as to their effect, or the reasonable inference to be drawn therefrom, it is proper to give a peremptory instruction.

**Ejection of Trespasser—Failure of Evidence to Show Ejection.**—Two men entered a freight car at B. for the purpose of stealing a ride to a distant station. After passing one station, the train stopped at a place at which it was not accustomed to stop, and several hours thereafter the two men were found at that place, near the track, unconscious from injuries which seemed to have been inflicted by some blunt or heavy instrument. It was the duty of the servants in charge of the train to eject trespassers on discovering their presence. In an action against the railroad company to recover damages for the death of one of the men, *held*, that a peremptory instruction for defendant was proper, as the jury could not infer that the men were ejected from the train, and that unnecessary force was used in ejecting them.

Appeal from circuit court, Warren county.

“Not to be officially reported.”

Action by the administrator of Cooper Morris against the Louisville & Nashville Railroad Company to recover damages for the death of plaintiff's intestate. Judgment for defendant, and plaintiff appeals. Affirmed.

Rodes & Rodes, Proctor & Herdman, and Sims & Covington, for appellant.

J. A. Mitchell, H. W. Bruce, E. W. Hines, and W. D. Hines, for appellee.

Paynter, C. J. This action was instituted by the appellant against the appellee, its agents and employees who were in charge of freight train No. 113 on its road. It is averred, in substance, that train No. 113 was a through freight running from Bowling Green, Ky., to Paris, Tenn.; that it started south on its trip at 12:30 o'clock a. m.

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on April 11, 1897; that the decedent, Cooper Morris, and also Mason Thomas, were riding thereon in a stock car; that the rules of the company required its employees to eject them from the train when found thereon; that, acting under such rules, they ejected plaintiff's intestate, Cooper Morris, from the train between Bowling Green, Ky., and Clarksville, Tenn., near the town of Rockfield, Ky.; that in ejecting him from the train they did, with gross negligence, wound and injure him in such a way that he died therefrom two days thereafter; that the plaintiff cannot tell, and has no means of knowing, the exact place at which the intestate was so wounded and injured; that the injuries were inflicted by the agents and servants of the appellee somewhere between Bowling Green, Ky., and Paris, Tenn., near Rockfield, Ky., or were inflicted at the place where their bodies were found; that the injuries were caused by the joint and concurring gross negligence of the employees and servants acting for and under the rules of the appellee; that all the defendants were present, aiding and abetting, consenting and approving the wrong and injury inflicted upon the intestate. The administrator of the estate of Cooper Morris, deceased, asked damages on account of his death, which resulted from the alleged injuries. The jury found for the appellee under a peremptory instruction. It is to review the action of the court in giving that instruction that this appeal is prosecuted.

The evidence offered by the plaintiff conduces to show that freight train No. 113 is a through freight running from Bowling Green, Ky., to Paris, Tenn.; that it left Bowling Green at 12:30 o'clock a. m. on April 11, 1897; that about the time it left the intestate and one Mason Thomas boarded it, one of whom had entered a rack or cattle car, and the other was going into it through an opening in its end; that they entered the car without the knowledge of those in charge of the train; that they had started to Clarksville, Tenn.; that they were not again seen by any of the witnesses for the plaintiff until, some hours afterwards, they were found on the side of the railroad near Mrs. Taylor's house, a short distance from Rockfield station; that both of them were unconscious; that they never regained consciousness, and died two or three days afterwards at Bowling Green, where they had been carried, that they had cuts and bruises on their heads, their skulls being fractured,—all of which seemed to have been inflicted by some blunt or heavy instrument; that it was not usual for train No. 113 to stop at Rockfield. There is testimony offered conducing to show that on the night in question, about the time train No. 113 would reach Rockfield, a freight train going south stopped near Rockfield, near where Morris' and Thomas' bodies were found; that no other freight train went south that night except No. 113. The testimony also conduces to prove that each of the injured men had a small amount of money when they left home that night, and when found they still

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had it,—the latter fact being of value only for the purpose of tending to show that the injuries were not inflicted by a person or persons with a design of robbery. The facts which we are giving are the principal facts proven by the plaintiff.

On the conclusion of plaintiff's testimony the court refused to instruct the jury to find for the defendant, and required it to introduce its testimony, after hearing which, however, the court peremptorily instructed the jury to find for it. In considering the question as to whether a peremptory instruction should have been given to the jury, we will alone determine the matter from the testimony offered by plaintiff. It is insisted on behalf of appellant that the testimony offered was sufficient to authorize the court to let the case go to the jury.

**Peremptory  
Instructions.**

**Same.**

While the law guaranties a trial by jury in a case like this, yet this court, and all other courts in the American Union, so far as we are aware, give peremptory instructions in cases where it is proper for them to be given. In cases where peremptory instructions should be given, it cannot be said that in giving them a party is deprived of his constitutional right to a trial by jury. In a case like this he has his trial by jury, but it is the duty of the court to direct the jury as to the law which should govern its deliberation upon the facts submitted to it. Wherever there is any doubt as to the facts, it is the province of the jury to determine the question; or where there may reasonably be a difference of opinion as to the inferences and conclusions to be drawn from the facts, it is likewise a question for the jury. The plaintiff endeavored to show by his testimony that the intestate was not probably injured by being struck by one of the trains on appellee's road, but he failed to show that any of the officers, agents, or servants in charge of the train even knew that the deceased and Thomas had entered the rack or cattle car. Not a single witness testified that either of the appellee's employees on the train did or attempted to eject the deceased from the train. Neither is there any testimony which shows that the deceased had any words with any of its servants or employees, much less a conflict with them. There is no evidence, as we say, tending to show that they were ejected from the train, and therefore there could be none which tended to show that more force was used in accomplishing the ejection than was necessary. The plaintiff endeavored to show that it was not only the right of those in charge of the train to eject the deceased, but it was their duty to do so. The mere fact that this right and duty existed does not argue that the deceased was discovered, and the duty performed; and certainly no inference would follow that in the performance of such duty the agents and servants of appellee were guilty of a wrong and negligence resulting in the injury and death of the deceased. No one can read the testimony in this case, and say that either or any one of the officers or agents in charge of the train in-

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fllicted the injury. The mere fact that they were proven to be on the train does not show that they were forcibly ejected from it, and thereby injured. Assuming that the testimony shows that the train stopped at Rockfield on the night in question, still it is not legitimate to draw the inference from that fact that the men were forcibly and negligently ejected from the train. They might have been put off at that place, and still the men in charge of the train be perfectly innocent of the charge that they had inflicted the injuries upon them. They could have left the train at Memphis Junction, reached the point where their bodies were found, and there received their injuries from some one not connected with the train. They could have been put off the train at Rockfield, and have been injured after the train had departed from that place. The testimony of plaintiff does not develop a single fact which would justify a jury or court to infer that those in charge of the train had any motive to inflict the injuries which the intestate sustained. The fact that it was their duty to put him off if his presence had been discovered on the train, does not create a presumption that he was put off, and at the place where found, or that he was injured in an effort to put him off. The rule of this court is that, notwithstanding the court overrules a motion for a peremptory instruction at the conclusion of plaintiff's testimony, still, after hearing the testimony of the defendant, it may give such an instruction, the testimony of the defendant failing to strengthen that offered by plaintiff. All those in charge of the train testify that they did stop at Memphis Junction, a station about four miles from Bowling Green; that while there two persons were discovered on the train, and at the command of the conductor they left it; and one or two of the witnesses testify that the two men who left it remained standing at the station as the train pulled out. This station is from four to six miles north of Rockfield. All the employees in charge of the train testify that they did not eject Morris and Thomas, never had any conflict with them, and never inflicted any injuries upon them in any way whatever. A peremptory instruction for a defendant ought not to be given unless, after admitting every fact proven by plaintiff's evidence to be true, as well as all reasonable inferences that can be drawn therefrom, the plaintiff has failed to establish his case. *Fugate v. City of Somerset (Ky.)* 29 S. W. 970. A motion for peremptory instructions admits the facts given in evidence and every reasonable deduction to be drawn therefrom. Where the facts are undisputed, and the court can say there is no room for honest difference of opinion as to the effect of the facts, or reasonable inference to be drawn therefrom, then the court should give a peremptory instruction. *Dolfinger v. Fishback*, 12 Bush, 474. Suppose the court had submitted to the jury the inquiries: Who struck the fatal blow? Who was present when it was struck? The jury would have been forced to say it did not know. If the testimony



would force the jury to make that response, then it necessarily follows that no reasonable inference could be drawn from the facts proven that the appellee's employees inflicted the injuries upon the intestate, much less that the injuries were inflicted in the performance of their duties, and that they were the result of more force than was necessary to discharge their duties. In determining the propriety of a peremptory instruction, the court is necessarily bound to do so from the facts of each particular case, and therefore it cannot always have a precedent to follow. However, we have reached the conclusion in this case that the court properly gave a peremptory instruction, and, as in some degree supporting this conclusion, we cite the cases of *Railroad Co. v. Humphrey's Adm'r* (Ky.) 45 S. W. 503; *Gas Co. v. Kaufman* (Ky.) 48 S. W. 434; *Railroad Co. v. Wathen* (Ky.) 49 S. W. 185. The judgment is affirmed.

Ejection of Tres-  
passer—Failure  
of Evidence to  
Show Ejection.

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**MORGAN**

*v.*

**WABASH R. CO.**

(*Supreme Court of Missouri, Dec. 18, 1900.*)

[60 S. W. 195.]

**Accident on Track at Point Used as Footpath—Duty to Maintain Look-out—Negligence—Sufficiency of Evidence.\***—Plaintiff's husband, in full possession of all his senses, was walking on defendant's track, when he was struck and killed by an engine, tender, and caboose approaching from behind him without giving a warning whistle. The engine had been to a town a short distance from the accident, and, because of no turntable at the town, was obliged to run backward, and was pushing the tender ahead of it and drawing the caboose at the rate of about 25 miles an hour. The engineer and fireman could not see the track, or any one on it, because of coal piled on the tender, while the rest of the trainmen were in the caboose, so that none of them saw deceased before the accident. There was a clear view of the track for a considerable distance, so that, had deceased looked behind him, he could have seen the approaching engine, which was a special, and not running on schedule. The track was fenced, and ran along a public highway leading to the town, but for over 25 years it had been used constantly and by every one as a footpath from the town to a tie yard near a road crossing, to which deceased was going, and, for the convenience of those so using the track, steps had been erected over the railroad fence in the town and near the crossing. Held proper to overrule defendant's demurrer to the evidence, since, as the trainmen should have known that some one was likely to be on the track, plaintiff had a right to go to the jury on the hypothesis

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\*See notes at end of case.

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that the trainmen were negligent in failing to use the means at hand to prevent the injury, since by the exercise of ordinary care they have discovered the peril to deceased.

**Same—Whether Negligence in Walking on Track Necessarily Defeats Recovery—Statute—Duty to Trespasser.**—Rev. St. 1889, § 2611, providing that if any person not connected with or employed on the railroad shall walk on the track, except where the track is laid along a publicly traveled road, and be injured thereby, he shall be deemed a trespasser, in any action brought therefor, does not destroy plaintiff's right to recover, since such statute only means that under such circumstances the walking on the track is to be considered negligence *per se*, and will defeat a recovery in a case where contributory negligence would defeat it, but it does not relieve the company from all duty of exercising care towards a trespasser.

**Harmless Error.**—It was harmless error to submit to the jury the question as to the conduct of defendant's servants after they became aware of the peril of the deceased, there being no evidence tending to show that they saw him at all.

**Same.**—It was harmless error to charge that it was the duty of the men in charge of the train to have stopped it, if they could have done so by the exercise of ordinary care, after seeing deceased, since, as there was no pretense that any one on the train saw deceased, the trainmen having placed themselves where they could not see the track, the jury could not have been misled thereby.

MARSHALL and SHERWOOD, JJ., dissent.

In banc. Appeal from circuit court, Montgomery county; E. M. Hughes, Judge.

Action by Mary C. Morgan against the Wabash Railroad Company for the death of her husband. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The following is the opinion in division No. 1:

“Valliant, J. Plaintiff's husband was run over and killed by a train on defendant's road near Wright City, in Warren county, April 9, 1897, and this suit is to recover the damages

**Case Stated.** allowed by the statute in such case when the killing is the result of defendant's negligence.

The petition stated: That plaintiff's husband was walking eastward on the railroad track about a quarter of a mile east of Wright City, where the track was level and straight for a long distance, and which for many years pedestrians to and from that town had been accustomed to use as a road and footpath by the forbearance and tacit consent of the defendant. That the killing of plaintiff's husband was the direct result of the negligent, careless, and reckless manner in which the train was run, in this: ‘That after defendant's employees in charge of and operating said train seeing, or by the exercise of reasonable care and diligence, had they not been reckless in operating said train, could have seen, the dangerous position in which plaintiff's deceased husband, Caleb M. Morgan, was

situated, and seeing, or by the exercise of reasonable care and diligence, if said train had not been recklessly operated by defendant's agents and servants in charge thereof, could have seen, the imminent peril in which her said husband was placed, and that the deceased was unaware of the near and dangerous approach of said train, negligently failed to sound the usual and ordinary signal in time to avert the injury herein complained of, and in fact did not at any time before the injury to and death of her said husband either ring the bell, sound the whistle, or give any other signal by which her said husband might be warned of the near and dangerous approach of said train, and negligently failed and neglected to use the brakes or other appliances provided for stopping said train made up as aforesaid, and negligently failed to use the appliances provided and at hand for putting said train under control and stopping the same before it struck and killed her husband, but, on the contrary thereof, recklessly, negligently, willfully, and wantonly ran its said train against the plaintiff's said husband, so mutilating, wounding, and bruising him that from the effects thereof he then and there immediately died.' The answer admitted that defendant was a railroad corporation, etc., and that plaintiff's husband was killed by one of its trains at the time and place named, denied all other allegations of the petition, and averred that his death was due solely to his own negligence, in then and there walking on the track without looking or listening, when by so doing he could have heard the train in time. Reply, general denial. Briefly stated, the material facts brought out at the trial were as follows: Wright City is a village of about 450 inhabitants. The country immediately around it is thickly settled. There is a curve in the railroad track just east of the depot, which obstructs the view; but after passing around it the track is straight and the view is clear for a distance of 1,300 feet, down to the Kennedy crossing, where the accident occurred, and so on to the Stringtown road crossing, a quarter of a mile or so further east. It is about half a mile from the depot to the Kennedy crossing. The Kennedy crossing is a private farm crossing. The Stringtown road is a county road crossing the railroad. Near the Stringtown road crossing is a tie yard, where for eight or ten years a considerable number of men engaged in that business have delivered ties to the railroad. Wright City is the usual trading point for these tie men, and they usually walk on the railroad track in passing between the tie yard and the town. The railroad track at this point is fenced as the law requires, and there is a public road running parallel to the railroad on the south side, though it varies in distance from the railroad, being 200 yards from it at the Kennedy crossing. For twenty-five years or more the railroad track from Wright City to Stringtown road crossing had been constantly used by the town people and people residing in the neighborhood—men, women, and children—as a footpath, in

preference to the county road; and steps had been constructed over the railroad fence in the town, and also near the Stringtown road crossing, for the convenience of pedestrians going upon the track. Morgan, the plaintiff's husband, was a farmer living about five miles northeast of Wright City, and engaged, also, in the tie business, and was accustomed to pass to and from Wright City and the Stringtown road by walking along the railroad track. On the day of the accident he was walking on the track, going east towards the Stringtown road

Accident on  
Track at Point  
Used as Foot-  
path—Duty to  
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out—Negligence  
—Sufficiency of  
Evidence.

crossing, when he was struck and killed by a train going in the same direction. He was sixty-three years old; his senses of hearing and seeing unimpaired; but apparently did not hear the train; did not look around nor see it until it struck him. There was no one but the train crew on the train,—engineer, fireman, brakeman, and conductor,—neither of whom saw Morgan, and they did not know that an accident occurred until they were afterwards informed of it. It had been a train carrying seventeen empty freight cars, which came from the east to Wright City. There it left the freight cars, and the train, then reduced to engine, tender, and caboose, was returning east. It was a special train, not running on schedule time. There being no turntable at Wright City, the engine had to run backward on its return, pushing the tender in front, and drawing the caboose after it. The conductor and brakeman were in the caboose, from which they had no view of the track. The tender was wider than the engine, and was so loaded with coal as to prevent the engineer and fireman from seeing the track ahead of them, and they did not see Morgan at all, either before or after the accident, or know that an accident had occurred. The train was running at the time about twenty-five miles an hour. It was down grade, and could not have been stopped in less space than 500 feet. Before leaving the depot at Wright City the engineer whistled off brakes, by giving two blasts of the whistle. There was an automatic appliance for ringing the bell, and the engineer, who was called by plaintiff as a witness, testified that he set it ringing when he pulled out from the depot, and did not stop it until the train had passed the Stringtown road crossing. The other witnesses for plaintiff testified that the bell was not ringing. There was no whistle blown after starting. The only evidence was that introduced by the plaintiff, except that the defendant introduced some photographs of the railroad track and its immediate surroundings at the points referred to in the evidence. The defendant asked but one instruction, which was asked at the close of plaintiff's evidence, and again at the close of the whole case, and which was in the nature of a demurrer to the evidence, and was by the court refused, and defendant duly excepted.

"At the request of the plaintiff the court gave the following instructions: '(1) The court instructs the jury that under the

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law, if they find for plaintiff, their verdict must be for five thousand dollars, and that it cannot be for more nor less than that sum if for the plaintiff. (2) The court instructs the jury that if they shall believe from the evidence that Cabel M. Morgan, at the time he was killed, was the husband of plaintiff, and that this suit was brought within six months after his death; and shall further find from the evidence that the place on defendant's track where deceased was struck by defendant's train was near a private crossing on defendant's track, used as a private or farm crossing over said track, and that the track at the time was in such a condition and position for a distance of eight hundred feet or more west from the point of the catastrophe that a person walking thereon could have been seen by the persons in charge of said train, had they been at their proper posts, and on the lookout ahead of them, and that said track, at the place where Morgan was killed, and for some distance west thereof, had been for years prior thereto, and was at about the time said Morgan was struck and killed, frequently used by pedestrians in going to and from Wright City and the Stringtown crossing and points between the said places, and that Cabel M. Morgan, while walking upon defendant's track, became in imminent peril of being struck by defendant's train, and defendant's employees in charge of said train became aware of his peril of being struck in time to have enabled them, by the exercise of ordinary care, to have stopped said train and to have averted the injury to said deceased; or if the jury believe from the evidence that said employees in charge of said train, by the exercise of ordinary care, could have become aware of his peril in time to have stopped said train and to have averted said injury to said deceased, and they failed to exercise such care and stop said train, and that by reason of such failure to exercise such ordinary care the said train was not stopped, and said Morgan was struck and killed, —then the jury must find for the plaintiff, though the jury may find that the deceased, Cabel M. Morgan, was guilty of negligence in walking on defendant's track at the time. And by "ordinary care" is meant such care as an ordinary careful and prudent person would exercise under the same or similar circumstances. (3) The court instructs the jury that the defendant railroad company is not bound to whistle or ring the engine bell when approaching a private or farm crossing, and, further, that said defendant railroad company may regulate the speed of trains approaching private crossings as it may desire, by its own regulations; but nevertheless the jury are instructed that said defendant railroad company, knowing that said private crossings are likely to be used by persons passing over and upon the railroad track, are bound, when approaching said crossings, to keep a proper lookout and to use all reasonable precautions when approaching said private or farm crossing to prevent injury to any one on or approaching such crossings. (4) If the jury believe from the evidence that, at the point on

the track of the defendant where plaintiff's husband was killed, said track was clear and unobstructed, and sufficiently straight to permit a plain view along the track from any approaching train; and if the jury believe further that, at said point where said deceased was struck by the train, the roadbed of the defendant, both east and west of said spot, was at that time used, and had for a long period of time prior thereto been used, with the knowledge of the defendant, its servants and employees, by pedestrians as a passway leading to and from the village of Wright City,—then it was the duty of the employees of the defendant in charge of the train, when approaching such portion of the roadbed of defendant as was used as aforesaid as a passway, to keep a lookout for persons and to ascertain that the track was clear. (5) And if the jury further believe from the evidence that the engineer or fireman or other employees in charge of the train which struck the deceased saw the deceased on the track, or might have seen him by the exercise of ordinary care on their part; and if the jury further believe that the deceased was unaware of his peril, and was proceeding along the railroad track unconscious of the approaching train,—then it was the duty of such engineer or fireman or employee of the defendant so observing the deceased to give him proper warning of the approaching train, and it was his duty to give such warning by such signal as was within his power,—as could be likely heard and would be likely heard by any person possessing in an ordinary degree the sense of hearing, in the position the deceased occupied. And, if such signal was given and unheeded, then it was the duty of such employees to stop said train, provided said train could be stopped with safety to those on board of the same; and unless, at the time of the injury, the employees of the defendant in charge of said train used the means at their command to provide for the safety of the deceased after they discovered his imminent peril, the jury may find a verdict for the plaintiff in this case, although they may believe that the plaintiff was guilty of negligence in being upon the track of the defendant, and in permitting himself to be inattentive to the dangers surrounding him.' To which defendant duly excepted. There was a verdict for plaintiff for \$5,000, motion for new trial, which was overruled, and defendant appealed.

"1. Appellant's first proposition is that the court erred in refusing its instruction in the nature of a demurrer to the evidence. This is based on two grounds: First, that the plaintiff's husband was guilty of negligence contributing to the accident; second, that he was a mere trespasser on the railroad track, and the defendant owed him no duty to be on the lookout for him. It will simplify our task if we avoid the discussion of legal propositions not in the case. There can be no doubt, under the evidence, that the death of the plaintiff's husband resulted from the negligence of the defendant's servants in charge of the train, and the negligence of the deceased him-

self, contributing thereto. The train crew started out from the station with the conductor and brakeman in the caboose in the rear, where they could not see the track in front; and the engineer and fireman were behind the tender, upon which coal was so piled up that they could not see ahead of them, or, as the counsel for appellant say in their brief: 'The tender was wider than the engine, and, being filled with coal, effectually shut off the engineer's and fireman's view of the track to the east.' There was no excuse for that condition. True, there was no turntable at the station, and that fact made the running of the engine backward a necessity; but piling the coal up so as to shut out the engineer's view of the track, and locating the crew so that not one of them could see what they were running into, was a mere convenience. If, after the conductor and brakeman had closed in in the caboose, and the engineer had started the train, he and the fireman had blindfolded themselves, they would not thereby have been rendered less capable of guarding against such an accident than they were when in the condition as shown in this evidence. And, on the other hand, the deceased, a man in the full possession of his senses, selecting for his own convenience the dangerous path in the railroad track, where he was bound to know that a train was liable to pass at any time, and as liable to come from one direction as the other, walking leisurely and unconcernedly, without turning his head to look, and apparently allowing his meditation to so close his ears that the ordinary rumble of the train and the sound of the bell (if the bell was ringing) were not heard, was certainly guilty of negligence, but for which, even with the negligence of the defendant's servants, he would not have been killed. We will therefore not now stop to discuss the law of contributory negligence. That law has been discussed from almost every conceivable point of view in our Reports. But, conceding the contributory negligence of the plaintiff's husband, we advance to the consideration of the question, is the defendant liable upon the ground that it failed to use the means at its hand to save the man, when by the exercise of ordinary care it would have discovered his peril in time to have done so? The answer of the appellant to this question is that its servants did not actually see the man, and that, as he was a trespasser on its track, they owed him no duty to be on the lookout for him; and section 2611, Rev. St. 1889, is quoted as authority for so designating him. But we cannot dismiss the subject by simply calling him a trespasser, for even a trespasser is not entirely beyond the pale of the law. In a recent case the writer of this opinion took occasion to express his individual inability to appreciate the reasoning upon which is founded the so-called humane doctrine; that is, the doctrine permitting, under certain circumstances, a recovery on the ground of negligence when the party has himself been guilty of contributory negligence. *Schmidt v. Railroad Co.*, 149 Mo. 269, loc. cit. 285, 286, 50 S. W. 921. But at the same time he recognized

that such is the law, too firmly settled to be now contested, and that it stands on ample authority, if on nothing else, not only in this jurisdiction, but elsewhere. The aim of all law is the attainment of right and justice. Experience has shown that this is best accomplished by the laying down of certain general principles by which all conduct must be adjudged, rather than by leaving each case to make its own law. Yet, with the utmost care and the light of experience, it is found that human wisdom is finite; that what we sometimes call the result of the perfection of reason is still imperfect; and we are compelled to own that exceptions must be made to our best-reasoned rules. The most satisfactory statement of the doctrine which flows from the exception to the rule of contributory negligence, and the ground upon which it stands, that the writer has seen, is in *Kellny v. Railway Co.*, 101 Mo. 67, loc. cit. 75, 76, 13 S. W. 806, 8 L. R. A. 783, wherein this court, per Brace, J., said: 'We know of but one exception to the rule that where an injury is the product of the joint, concurring acts of negligence of both plaintiff and defendant the plaintiff cannot recover, and that is an exception made on grounds of public policy and in the interest of humanity, to prevent and restrain, as far as may be, a willful, reckless, or wanton disregard of human life or limb or property under any circumstances; and that is when the injury was produced by the concurrent negligent acts of both plaintiff and defendant. Yet if the defendant, before the injury, discovered, or by the exercise of ordinary care might have discovered, the perilous situation in which the plaintiff was placed by the concurring negligence of both parties, and neglected to use the means at his command to prevent the injury, then his plea of plaintiff's contributory negligence shall not avail him. This exception proceeds, not upon the theory that the defendant has been guilty of another and independent act of negligence, which is the sole cause of the injury, and which must be charged as a separate and independent cause of action, but upon the ground that the negligence he was then in the very act of perpetrating was characterized by such recklessness, willfulness, or wantonness as that he shall not be heard to say that the plaintiff was also guilty of contributory negligence.' If there was ever a case, short of willful murder, calling for the application of that doctrine, and justifying its recognition in our law, it is the case at bar.

"The clause of the statute above referred to by appellant is a part of that statute which imposes on the railroad company the duty of fencing its track, and penalties for failure to do so, and is as follows: 'If any person not connected with or employed upon the railroad shall walk upon the track or tracks thereof, except where the same shall be laid across or along a publicly traveled road or street, or at any crossing, as hereinbefore provided, and shall receive harm or accident on account thereof such person shall be deemed to

Same—Whether  
Negligence in  
Walking on  
Track Neces-  
sarily Defeats  
Recovery—Stat-  
ute—Duty to  
Trespassers.



have committed a trespass in so walking upon said track in any action brought by him on account of such harm against the corporation owning the railroad, but not otherwise.' The meaning of that clause in the statute is that under such circumstances the walking on the railroad track is to be considered negligence per se, and will defeat a recovery in a case where contributory negligence would defeat it. Such is the effect of the quotation in the brief of appellant's counsel from the text writer. Beach, Contrib. Neg. (3d Ed.) §§ 202-212. And, if he was simply a trespasser, the same law writer is authority for saying that the liability of the company 'must be measured by the conduct of its employees after they become aware of his presence, and not by their negligence in failing to discover him.' Id. § 203. This court has recognized the same rule. In *Rine v. Railroad Co.*, 88 Mo. 392, loc. cit. 400, the defendant asked this instruction: 'Defendant is liable in this case only if its servants failed to exercise ordinary care to prevent the injury after they became aware of the danger to which deceased was exposed,'—before giving which the court added, 'or after they might have become aware thereof by the exercise of ordinary care.' This court held that the instruction should have been given as asked, and that the modification was error. In that case the engine was switching, running backward. The engineer and fireman were at their posts. The deceased was familiar with the tracks and switches, knew the engine was coming, looked back, and saw it when it was close to him. The fireman saw him, but supposed he would step off the track in time. Under that state of facts the court, per Black, J., said: 'Here the fireman and engineer were at their proper places, were not going at an unlawful rate of speed, and were not negligent in the management of the engine and tender, unless it was after one of them saw deceased was in actual danger. The deceased was a man of discretion. He was familiar with the operation of the train, and also with the operation of the switches, over one of which he had just passed. All this the fireman well knew, and he had a right, under the circumstances, to assume that the deceased would use ordinary prudence, at least, for his own protection. Such qualification as the one in question will be proper in some cases, but it cannot and ought not to be applied in this case.' *Rine v. Railroad Co.*, loc. cit. 400. In *Barker v. Railroad Co.*, 98 Mo. 50, 11 S. W. 254, the deceased was a trespasser on the track, within the terms of the statute quoted, and there was no qualification of that status. The court, by the same learned judge, said: 'Being a trespasser, the company owed him no duty, except not to wantonly, willfully, or with gross negligence injure him.' Then, after referring to the doctrine we are now discussing, the court said: 'But this duty on the part of defendant's servants only arises when and after the perilous position of the person has been discovered. \* \* \* But the argument is made on

behalf of the plaintiff that, if the engineer was at his post of duty and on the lookout, he could have seen the deceased, and, if he was not, then he was guilty of negligence. The answer to all this is that the company owed the deceased no duty to be on the watch for him. \* \* \* As to him there was no breach of duty, for a simple failure to discover him in the commission of a trespass. As stated by a reliable text writer, the general duty of a railroad company to run its trains with care becomes a particular duty to no one until he is in a position to complain of neglect. Cooley, Torts, 660.' After thus stating the law the court said: 'It is thought advisable to say again that Barker got upon the track and was killed at a place where the defendant's road was fenced, and where there was nothing in the surroundings that would naturally or reasonably lead the servants in charge of the train to suspect that persons would be on the track. We have been speaking of the case before us, not of others which may present a different state of facts.' The above authorities state the law as contended for the appellant as strongly as any to which our attention has been drawn, and it will be noted that they state it with reservation. In *Williams v. Railroad Co.*, 96 Mo., loc. cit. 280, 9 S. W. 573, after citing *Isabel v. Railroad Co.*, 60 Mo. 475; *Harlan v. Railroad Co.*, 64 Mo. 480; *Zimmerman v. Railroad Co.*, 71 Mo. 477; *Yarnall v. Railway Co.*, 75 Mo. 583; and *Maher v. Railroad Co.*, 64 Mo. 267,—Judge Black, again speaking for the court, said: 'The general rule of the authorities before cited implies that the engineer is not bound to foresee the wrongful presence of persons upon the track or cars. The rule, however, as before stated, will in some cases require a modification. It was said in the case of *Harlan v. Railway Co.*, 65 Mo. 22, that the company would be liable, though the person injured or killed was wrongfully on the track, if the defendant failed to discover the danger through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the danger and averted the calamity. This qualification of the general rule was, in substance, asserted in *Scoville v. Railroad Co.*, 81 Mo. 434; *Frick v. Same*, 75 Mo. 595; *Kelley v. Railroad Co.*, 75 Mo. 138. \* \* \* Thus it will be seen that cases may and do arise where, though the company is entitled to a clear track, it cannot fairly be presumed that the track is clear. A duty then arises to look out, and the liability is not limited to want of care after discovery of the danger.'

"It is argued that, since the statute denounces as a trespasser one walking on the track of a railroad that is fenced, no custom or usage can alter that condition; and *Lawson, Usages*, § 216, is cited. Of course, usage and custom cannot repeal a statute, and it is not contended here that it does. But usage and custom may change the condition of a thing upon which the statute operates, and by usage and custom a publicly traveled footpath may be in fact created within an

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otherwise private inclosure, so that a person found walking upon it would not be amenable as a trespasser. The language of the statute itself excepts a track laid along a 'publicly traveled road.' To fill this description it need not be a public road, but must be publicly traveled. If the railroad company (as the evidence tended to prove) in this case for more than twenty-five years had acquiesced in its track being used as a footpath by the whole community, it cannot, if it does wrong, take refuge in the fact that its track was inclosed private property. Under such circumstances this court, in *Lynch v. Railroad Co.*, 111 Mo., loc. cit. 609, 19 S. W. 1114, per Thomas, J., said: 'We are not called upon at this time to decide whether a trespasser can take advantage of a failure of a railroad company to comply with city ordinances of the character of those read in evidence in this case, for all the evidence, as set out in defendant's statement, shows that the said road, right of way, and tracks at the point of the accident were habitually used by the public for a passway to the streets of the city; there being four gates in the fence to enable pedestrians to get upon the right of way and tracks. Therefore, so far as the locus in quo, as to pedestrians, is concerned, it is the same as if it had not been fenced at all.' In the same case it is decided that it is proper to instruct a jury that they may find for the plaintiff not only if the defendant's servants saw the deceased in time to avoid the injury by the exercise of ordinary care, but also if they, by the exercise of ordinary care, might have seen him in time to have averted the injury, citing and approving *Guenther v. Railway Co.*, 108 Mo. 18, 18 S. W. 846; *Fiedler v. Same*, 107 Mo. 645, 18 S. W. 847. In *Chamberlain v. Railway Co.*, 133 Mo. 587, 33 S. W. 437, 34 S. W. 842, where the defense was, as here, that the deceased was a trespasser on the track, and therefore they owed him no duty to be on the lookout for him, this court, in an opinion by Gantt, C. J., approved an instruction that authorized a verdict for plaintiff if the jury found, inter alia, that the servants in charge of the train by the exercise of ordinary care could have seen the deceased in time to have averted the accident by the appliances at hand, and failed to do so, and affirmed a judgment for plaintiff on a verdict found under that instruction. There are other cases in our Reports on this subject, but those above quoted are sufficient to show that the law on this point has been well considered and definitely settled by this court, and our decisions are all in harmony; the liability of the defendants in the Rine and Barker Cases being limited to the negligence of the trainmen after they became aware of the perilous position of the person in jeopardy, because the facts of those cases did not justify a wider range of inquiry, and in the other cases extending it to negligence in failing to use the means at hand to prevent the injury when they might with ordinary care have discovered the peril. In the one class of cases the train crew had no rea-

son to expect a man to be on the track. In the other class they had reason to expect such a condition, and the duty of those handling the train varied as the circumstances required. In this case the men in charge of the train had no right to expect a clear track. For more than twenty-five years, as the evidence tended to prove, the track was the footpath for the pedestrians of the town and vicinity. Steps built to go over the fence, in addition to the gates the law required, were standing invitations to the public to come upon the tracks and use them for a footpath. In the Barker Case it was said, 'There was nothing in the surroundings that would naturally or reasonably lead the servants in charge of the train to suspect that persons would be on the track.' But the reverse is true of this case. We attach no significance to the fact that the man was killed near the farm crossing, for he was not using the crossing as such. He was walking along the track, not merely crossing it, and his proximity to the Kennedy crossing was a mere coincidence. The law of the case would have been the same if there had been no crossing at that point. As an abstract proposition, it was negligence in the trainmen to have failed to observe that crossing, but the concrete proposition with which we are dealing is that it was negligence in them to have failed to look out for a man walking along the track as the plaintiff's husband happened to be, and, as the evidence tended to show, the railroad people should have known some one was liable to be. The very composition of this train, the necessity of running it as it was, the impossibility, under the circumstances, of the engineer and fireman seeing, from their usual positions on the engine, the track in front of them, created a necessity for placing some one of the crew where he could see, and distinguishes this case from the Rine, Barker, and other like cases. Under the circumstances of this case, to station some one where he could see what the train was running into would not be extra caution, but would be the suggestion of the most ordinary prudence. The plaintiff had a right to go to the jury on the hypothesis that the servants of defendant were negligent in failing to use the means at hand to avert the calamity after, by the exercise of ordinary care, they would have discovered the peril. The demurrer to the evidence was properly overruled.

"2. The instructions given were, in the main, like those given in other cases and approved by this court; but it does not follow that an instruction which is proper in one case is necessarily proper in another, having a general resemblance to the first. As we have seen, in the Rine and Barker Cases it was adjudged to be improper to submit an hypothesis to the jury involving negligence of defendant's servants after they might, by the exercise of ordinary care, have discovered the peril, yet altogether proper to have done so in other cases cited. So in the case at bar it was improper to have submitted to the jury the question as to

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the conduct of defendant's servants after they became aware of the peril of the deceased, for the reason that there was no evidence tending to show that they did see him at all. It was also improper to have instructed the jury, under the peculiar circumstances of this case, that it was the duty of the men in charge of the train to have stopped it if they could have done so by the exercise of ordinary care. That would be a correct instruction under certain conditions, examples of which are shown in the facts of the cases cited, where such instructions were given. But what we here say is in reference to the facts of this case. An engineer at his post, in view of the track, seeing a man on it, apparently able to take care of himself and the conditions such that he can get off in safety, has a right to presume that he will do so, and the engineer is not required to stop his train whenever he comes within stopping distance of every man he may see on the road. If authorities were needed on this proposition, they will be found collected in abundance in note 4, § 203, Beach, Contrib. Neg. (3d Ed.). But the law does impose on the engineer, under such circumstances, the duty of giving such warning signals as may be at his hand, and as the situation reasonably demands. Good common sense, brightened with the light of experience, will dictate what he should do. If the facts were as the evidence tended to prove, the plaintiff's husband was walking on the track unconscious or unmindful of his danger, not hearing the rumbling of the train nor the ringing of the bell. Then, if some one had been on the lookout, even after the train had approached too close to be stopped, and had given a few sharp blasts of the whistle, it would not be unreasonable to presume the man's attention would have been aroused, and his life have been saved. At all events, if that had been done the defendant could with better reason say that its servants had not been reckless in their management of the train. The only errors we find in the instructions are those above specified, namely: First, the hypothesis that the men in charge of the train saw the deceased in time to have averted the accident; and, second, that it was their duty to have stopped the train. With those features eliminated, the instructions properly declared the law applicable to the evidence. But, whilst those features of the instructions were inapplicable to the facts of this case, they were, as to this case, mere abstract propositions, that could not possibly have affected the verdict. There was no pretense that any man on the train saw the man on the track. The undisputed facts show that the trainmen had wilfully placed themselves where they could not possibly see before them. They went blindly down the road, neither seeing nor caring for the consequences, and never knew that they had killed the man until they learned it historically. How, then, could the jury have possibly been misled by the statement that, if the engineer saw the man in time to have stopped the train, he should have done so? The

Same.

law is that a judgment should not be reversed unless it is believed that error was committed 'materially affecting the merits of the action.' Section 865, Rev. St. 1899. There is no such error in this record, and therefore the judgment is affirmed.

"Brace, P. J., concurs. Robinson, J., concurs in the result. Marshall, J., dissents."

Geo. S. Grover, for appellant.

Norton, Avery & Young and J. D. Barnett, for respondent.

Per curiam. The foregoing opinion by Valliant, J., in division No. 1, is concurred in by Gantt, C. J. Burgess and Brace, JJ., concur. Robinson, J., concurs in the result. Sherwood and Marshall, JJ., dissent.

Marshall, J. (dissenting). 1. Briefly stated, my reasons for dissenting in this case are these: The facts show that the track was practically straight for about 1,300 feet; that the engine was backing with the tender piled with coal so that the engineer and fireman could not see the deceased on the track; that the deceased walked on the track with his back to the train, and never looked behind; that the deceased was in the full possession of all his senses; and that he lived in the neighborhood, and knew that trains were liable to pass long there at almost any time. The train was running about 25 miles an hour. The place where the accident occurred belonged to the defendant, and was not within the corporate limits of any city or town. The trainmen did not actually see the deceased or know he was on the track until after he was killed, and the deceased did not see the train coming. It is measurably clear that the deceased could have heard the noise made by the running of a train at the rate of 25 miles an hour quite as easily and distinctly as the trainmen could have heard the deceased walking along the railroad track, and likewise that the deceased could have seen the train as clearly and as quickly as the trainmen could have seen him. In my judgment, it was negligence for the trainmen to run the engine backward with the tender so piled with coal as to prevent them from seeing a person on the track, and it was negligence for the deceased to walk along a railroad track without looking back to see if a train was coming. If the trainmen had not been thus negligent, they would have seen the deceased in time to stop the train before injuring the deceased, or to have sounded the whistle often enough to attract his attention, and thus cause him to get off of the track; and, if the deceased had not been thus negligent, he would have seen the train, and could and would have avoided the accident by getting off the track, and so would not have been injured, even though the defendant was negligent. Thus the defendant was negligent and the deceased was negligent, and the mutual negligence

of both parties was the concurrent and proximate cause of the accident. The majority opinion concedes this to be true. There is no element of wantonness in the case. The trainmen did not actually know of the peril of the deceased, and did not intentionally run over him; and the deceased did not actually know of his peril, and did not intentionally permit himself to be run over. "Wantonness" means a wrongful act intentionally done, and, while both parties were guilty of a wrongful act, neither intended that the injury should be done. The majority opinion concedes that there was no wantonness in the case. And this must be so, for the act of the trainmen was no more wanton than the act of the deceased. The majority opinion, however, proceeds upon the idea that the act of the defendant was so grossly negligent as to amount to recklessness. Conceding that this is true, the act of the deceased was of the same character, degree, and extent as that of the trainmen. So the recklessness of the one was just as great—no more or less—as that of the other; and the recklessness of both combined to produce the result, which would not have happened if only either one of the actors had been reckless, and the other had not. The track was straight. Each could have seen the other if they had not been negligent or reckless. "Recklessness" means doing an act knowing that injury to another is liable to ensue, and not caring whether it does ensue or not, but it does not imply or involve actual knowledge that the injury is about to be done to another in time to avoid the doing thereof. If it be granted that the trainmen knew that they were liable to injure persons on the track by backing the engine so loaded with coal as to prevent their seeing such persons, and did so without caring whether they injured such person or not, and were therefore guilty of recklessness, it is also true that the deceased must have known that, by walking along a railroad track without looking back for trains which he knew were liable to pass at any time, he was therefore just as reckless as the trainmen. This case is not nearly so strong a case for the plaintiff as the case of *Rine v. Railroad Co.*, 88 Mo. 392, or *Jackson v. Railroad Co.* (not yet officially reported) 58 S. W. 32. Yet in both those cases the plaintiff was held not to be entitled to recover, while here the majority opinion affirms a recovery by the plaintiff. In the first case above cited the engine was backing, and the deceased was walking along the track, with his back to the engine. Each saw the other. The trainmen supposed the deceased would get off of the track, and the deceased intended to and attempted to get out of peril, and actually stepped off of the main track on which he was walking onto a side track. The deceased did not know the engine was going to run onto the switch track, while the trainmen did know that fact. Yet a judgment for the plaintiff was reversed, and the opinion, written by Blake, J., was concurred in by Henry, C. J., and Norton, Ray, and Sherwood, JJ. And it was distinctly held

that the defendant was only liable if it actually knew of the peril of the deceased in time to avoid the injury, and did not use ordinary care to prevent the accident, and that it was not liable if it was simply negligent in not using ordinary care to discover such peril. This case is a condemnation of "Thompson's discovery clause," and of the instruction given for the plaintiff in this case, and an instruction into which the court had inserted Thompson's discovery clause was expressly declared to be erroneous. In the Jackson Case the deceased was rather weak-minded, and strayed away from the care of his family and walked along the railroad track, in a town, with his back to the approaching train, which was running quite as rapidly as the engine in this case, and was run over and killed. The track was straight. The engine was running forward. The trainmen saw the deceased, but assumed that he would get off of the track. The deceased did not see the train. Yet under these circumstances a judgment for the plaintiff was reversed without remanding the cause, and the opinion, written by Burgess, J., was concurred in by Gantt, P. J., and Sherwood, J. Let those who can reconcile the opinion in those cases with that of the majority in this case. I confess my inability to do so.

The plaintiff in this case relies chiefly upon the case of Chamberlain v. Railway Co., 133 Mo. 587, 33 S. W. 437, 34 S. W. 842, and insists that the judgment must stand unless that case is overruled. On the other hand, the defendant strongly relies on the case of Sinclair v. Railway Co., 133 Mo. 233, 34 S. W. 76, and contends that the judgment must be reversed unless that case is overruled. In none of its salient features is the Chamberlain Case like the case at bar, for in that case both parties (plaintiff and defendant) tried the case upon the theory that Thompson's discovery clause was the true law. There the engine was running forward. The trainmen saw the deceased in time to prevent the accident. The deceased was walking along the track, with his back to the coming train, and was not aware of his peril. A recovery by the plaintiff was affirmed by a majority of this court in banc, on the ground that the defendant did not use ordinary care to prevent the accident after it actually saw the peril of the deceased. In the Sinclair Case Thompson's discovery clause was not invoked by the plaintiff, or the jury instructed on that theory. On the contrary, the charge was a failure of the defendant to exercise ordinary care after it actually knew the peril of the deceased. In that case, as here, the deceased walked along the track, as was his custom and that of people living in the locality, with his back to the approaching train, and did not look behind him for the coming train, but was apparently oblivious of the conditions and passing events. The case turned upon the question of whether the train men used ordinary care to avoid the accident after they actually knew of the peril of the deceased, and, the facts showing that



they did so, the judgment for the plaintiff was reversed by this court. The principles herein set forth were not in terms presented in that case, and hence were not expressly decided, but the relative duties of the railroad and persons using its tracks were so fully and clearly stated in that case by the learned and lamented Judge Macfarlane that what was said is extremely opposite to this case, and are so refreshingly wholesome reading that I adopt them and set them out again in full. That distinguished jurist said:

“(1) That deceased had negligently placed himself in a position of danger is not controverted by plaintiff. Ordinarily such contributory negligence would bar a recovery. But there is a well-recognized exception to the rule. The employees of a railroad corporation, in charge of a train, owe, even to a trespasser, the duty of care to avoid injuring him. *Fiedler v. Railway Co.*, 107 Mo. 647, 18 S. W. 847. The ground of this action is a neglect to perform that duty. Under the cause of action stated in the petition, the original negligence of deceased in walking upon the track is impliedly admitted. His negligence in that particular is not, therefore, an issue in the case, as made by the pleadings. The right of recovery depends upon the conduct of the parties in the situation they occupied immediately preceding the collision. The question involved requires a determination of the respective duties of the engineer and deceased in the circumstances in which they were situated, and whether those duties were discharged. To determine these the situation and surroundings must be considered. The day was mild, for the season, and there was but a slight breeze in the air. The train was running through a farm, on a slightly ascending grade. There was neither noise nor objects to distract or attract the attention of either the engineer or deceased, except the noise of the train and the ringing of the engine bell. The train was equipped with all modern improvements intended for controlling it. The engineer had twenty years' experience, and was presumably skilled. The petition charges that the engineer was negligent, after seeing the dangerous position in which plaintiff's husband was situated, in failing to give a danger signal of the approach of the train. What was the duty of the engineer in respect to giving deceased warning, and when did that duty arise? It may be safely said, as a general rule, that the duty of care arises in all cases as soon as the perilous situation of the trespasser is discovered. The instinct of self-preservation, as well as common judgment, impels one on a railroad track to leave it on the approach of a train. This law of nature is universal with intelligent beings. From this universal law is evolved the legal principle that persons in charge of a train have the right to presume that one walking upon the track will leave it in order to allow a train to pass, if they have knowledge of its approach. Under the circumstances

in which these parties were placed, the immediate duty required of the engineer, when he saw that deceased was unaware of his peril, was to give a proper warning. This duty required such a signal as could have been heard and could not have been misunderstood; such a one as would arouse deceased from his apparent mental abstraction or indifference to a sense of his danger, and the necessity of action on his part to avoid it. That such a signal was given is not denied, and is established by the evidence of many witnesses, and is disputed by none. It was also the usual danger signal. It was heard all over the immediate neighborhood. One witness, called by plaintiff, who was some distance from the place of the accident, described it as a sharp whistle, such as is given for stock on the track, and that it could have been heard two or three miles. The engineer cannot be charged with negligence as to giving a signal, nor as to its character and sufficiency.

"(2) The next inquiry is whether the notice was timely. The engineer testified that he first saw deceased when about four hundred feet from him, and immediately gave the danger signal. If his testimony is true, then the charge of negligence in respect to giving the signal is met and refused. There was no direct evidence that the engineer saw deceased sooner, nor is there a charge of negligence in failing to see. But the evidence shows that deceased was in full view of the engineer for about one-eighth of a mile, and from that circumstance, coupled with the duties of the engineer to his employer to keep a watch upon the track, a jury might infer that deceased was seen for more than four hundred feet. *Rine v. Railroad Co.*, 100 Mo. 235, 12 S. W. 640. Assuming, then, that the engineer saw deceased as soon as he came in sight, when did his duty of care begin? Deceased was bound to know, and in this case did in fact know, that a train was due behind him. It was his duty to keep a vigilant watch for it. Indeed, that duty is imposed upon all who go upon a railroad track. The engineer had the right to suppose when he first saw him that he would hear or see the train and leave the track. It was recently said by this court: 'Defendant, of course, had the right of way, and was not bound to anticipate that persons trespassing on the track would not step aside before a coming train.' *Hyde v. Railway Co.*, 110 Mo. 279, 19 S. W. 483. In another case it was said: 'When plaintiff stepped on the track, it was the engineer's duty to warn him, and this he did. The engineer had a right to presume that an adult would at once step off the track and avoid danger. He was not required to stop his train until he saw plaintiff was in a position of danger or peril.' *Reardon v. Railway Co.*, 114 Mo. 405, 21 S. W. 731. In that case the court says further: 'The use of the steam brake immediately upon his entering upon the track would unquestionably have stopped the train, but whether it would after plaintiff had fallen and it became evident he was in peril was at least a debatable question.' From these cases,

and many others that might be cited, it seems to be well settled that where no conditions intervene to confuse, or to prevent hearing a signal and knowing its object, it will be sufficient, if given in time for the trespasser to leave the track safely. The question then is, was the signal given in time to have allowed deceased opportunity to escape the danger? The engineer testified that the danger signal was sounded when the engine was about four hundred feet from deceased. Other evidence made the distance three hundred and forty feet. These are the maximum estimates. If the train was running twenty-five miles per hour, which was the estimated rate, it covered about thirty-six feet every second, or three hundred and sixty feet in ten seconds. If deceased walked at the rate of two and one-half miles per hour, he would travel about three feet in a second, and thirty feet in ten seconds. Five feet would have taken him out of danger. McDowell, a witness for plaintiff, testified that while working about his barn he heard the whistle, and, thinking some of his stock was in danger, he stepped around to a point from which he could see the train and deceased. It required about three steps in order to get the view. He saw deceased walking down the track as though he did not know the train was following. After he got in sight the engine whistled two more times, the last of which was just as deceased was struck. After he came in sight of deceased he took three or four steps before he was struck. Even according to the evidence of this witness, deceased must have walked fifteen or twenty feet after the danger signal was given. He had, therefore, ample time to have escaped the danger after the signal. The engineer was not, therefore, negligent in respect to his first duty on ascertaining that deceased was not aware of the approach of the train.

“(3) The petition charges further that the engineer negligently failed and neglected to use the air brakes and other appliances ready and at hand for stopping the train. In other words, the charge is that the engineer was negligent in not stopping the train in time to avoid striking deceased. This duty of the engineer arose as soon as he knew, or by proper care ought to have known, that deceased did not regard the warning signal. The engineer, on this question, testified that after giving the signal, and observing that deceased did not heed it, he immediately put on the full force of the air brakes, reversed his engine, and did everything in his power to arrest the speed of the train and stop it, continuing at the same time to sound the alarm whistle. His evidence receives some corroboration from the trainmen and some other witnesses. There was no direct contradictory evidence. One of plaintiff's witnesses, who had been a locomotive engineer, testified that the engine was reversed between the first and second whistles, and the air brakes were on when the train stopped, but he did not know when the air was applied. The evidence

tended to prove, though conflicting on the question, that the engine ran five hundred and sixty feet after deceased was struck. The evidence also tended to prove that the train could have been stopped in six or seven hundred feet. From these facts the further fact that everything was not done that could have been done to stop the train might be inferred. But that is not the question. The question is whether the train could have been stopped in time to have avoided the calamity. If it could not, and the collision was inevitable, unless deceased acted, then, though the engineer was negligent, it could not be attributed to defendant, as the proximate cause of the disaster. When such dire results occur in so brief a period of time, it is difficult to measure accurately either time or distance. Suppose the engineer was three hundred and fifty feet from deceased when his duty to warn him arose, and the train was running twenty-five miles per hour, or say thirty-five feet per second. The engineer sounded the whistle and observed its effect. Say that occupied only three seconds. It could scarcely have been less. The train had then run one hundred and five feet nearer to deceased. Take two seconds more for applying the brakes of reversing the engine, and the train moved seventy feet further before its motion could have been retarded. The engine was then within one hundred and seventy-five feet of deceased. Suppose it ran five hundred and sixty feet after it struck deceased. The stop would have been made in seven hundred and thirty-five feet. It is perfectly clear that the life of plaintiff's husband could not have been saved by anything the engineer could possibly have done towards stopping the train; for, at most, he had only four hundred feet in which to do it. We must therefore conclude that no negligence on the part of defendant was shown.

"(4) This conclusion obviated the necessity of considering the contributory negligence of deceased after the signal was given. It was certainly his duty to leave the track immediately on hearing the signal, and not to depend upon the engineer to stop the train. If by reason of a neglect of that duty he was caught on the track, his contributory negligence would defeat his recovery, though the engineer was also guilty of negligence in not stopping in time to avoid the collision. The character of the signal was such that in the quietness of that afternoon, and the surroundings, we can but conclude that it was heard. The evidence also shows that deceased was struck within thirty-five feet of the point at which he would have left the track. It shows further that, after the signal was given, deceased changed his course from the center of the track, in a diagonal direction, towards the left rail, and when struck was outside of the rail. These facts show conclusively that the signal was heard by deceased. His subsequent conduct indicates that he miscalculated the distance it was from him, and thought he had time to reach the footpath by which he in-

tended to leave the track, or that he had time to walk off deliberately. One or the other of these conclusions must be drawn. In either case there would be contributory negligence. We are of the opinion that the evidence shows no liability, and the judgment is reversed. All concur."

This opinion was concurred in by Brace, P. J., and Barclay and Robinson, JJ. When the Chamberlain Case was decided in banc, the Sinclair Case was considered, and was followed and approved by the whole court. The majority of the court held that the insertion of Thompson's discovery clause in the instruction was not prejudicial error, under the facts in that case, because the evidence clearly showed that the trainmen did not exercise ordinary care to warn the deceased of his peril after they actually saw it, and further saw that he was unaware of his peril, and therefore a recovery by the plaintiff was affirmed by this court. But neither of these cases supports the doctrine of Thompson's discovery clause. In neither case was that doctrine approved. It was not present in the Sinclair Case, and in the Chamberlain Case the logic of the opinion of the court in banc is a condemnation of that doctrine, and an admission that it is not the true law. In my judgment, both of these cases can stand together, but in so far as they apply to this case they are sufficient authority for holding that the judgment in this case should be reversed, and by clear intendment are a renunciation and condemnation of the underlying want of reason and utter lack of mutuality of obligation and duty resting upon the respective parties—the railroad men and the person walking upon the track—which is expressed in Thompson's discovery clause. For the foregoing reasons, I am of opinion that the demurrer to the evidence should have been sustained, and therefore think the judgment should be reversed.

2. The instruction given for the plaintiff told the jury that if they found the defendant was negligent, and also found that the deceased was negligent, still they should find for the plaintiff, if they believed and found from the evidence that the defendant knew of the peril of the deceased, *or by the exercise of ordinary care could have discovered his peril*, in time to prevent the injury, and did not do so, unless they further believed and found from the evidence that the deceased knew of his peril in time to avoid the injury, and did not do so. This instruction is wrong, for these reasons: First, because it authorizes a verdict for the plaintiff unless both the trainmen and the deceased were wanton, when even the majority opinion holds that there is no element of wantonness in the case; second, because by employing the italicized words, "or by the exercise of ordinary care could have discovered his peril," in defining the defendant's liability, it mixes simple negligence with wantonness, and metes out the same punishment to the defendant, whether it was wanton or simply negligent, whereas in defining the liability of the deceased it limits his duty to

wantonness, and entirely omits the element of his negligence, in that, while it says the plaintiff cannot recover if the deceased knew his peril in time to avoid the injury, it does not prohibit a recovery if the deceased, "by the exercise of ordinary care, could have discovered his peril" in time to avoid the injury. The same reason, logic, and law which would mix the negligence and wantonness of the defendant should also mix the negligence and wantonness of the deceased. In my judgment, it is error to mix the two as to either the defendant or the deceased; but, if it is mixed as to one, it should, in common justice, be mixed as to the other, also. This is what Beach, *Contrib. Neg.* (3d Ed.) § 54, designated as "Thompson's Discovery Clause." The failure to exercise ordinary care to discover the peril of a person on a railroad track is simply negligence, and the failure of such a person to exercise ordinary care to discover his peril is contributory negligence; and a recovery by plaintiff under such circumstances is as much against the fundamental principles of law as if the negligence and contributory negligence had appeared upon the first analysis of the case, instead of after the case had been reduced by stages of reasoning or occurrence of events to its last or ultimate analysis. If this is not true, then some court or law writer or logician should tell why it is not true. No one has attempted to do so. The majority opinion in this case passes it over in silence. It is as certainly true as a demonstration in algebra that an instruction such as the one under consideration is equivalent to a peremptory instruction to the jury to find for the plaintiff; for it is conceded that the defendant was negligent, and that the plaintiff was guilty of contributory negligence. It is also conceded that neither party was guilty of wantonness, or, if they were, both were equally so guilty. Thus far the plaintiff's attorney could concede everything that the defendant's attorney was at liberty to urge upon the consideration of the jury. But the plaintiffs' attorney could and would say to the jury that the plaintiff was still entitled to a verdict, because the court had instructed them that if, by the exercise of ordinary care, the defendant could have discovered the peril of the deceased in time to have avoided the injury, and did not do so, the plaintiff was entitled to a verdict, and, as the track was straight for about 1,300 feet, the trainmen could, and, if they had exercised ordinary care, would, have seen the deceased on the track, and could have seen that he was heedless of the approach of the train, and hence could have stopped the train in time to have avoided the injury, or, as the majority opinion puts it, could have sounded the alarm whistle often enough to bring the deceased to a realization of his peril in time to have avoided the accident. There is no reply the defendant could make to such an argument, except that by the exercise of ordinary care the deceased could have discovered his peril in time to avoid the accident, and did not do so; and such reply was not available to the defendant, because the in-

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struction imposed no such duty upon the deceased, but, on the contrary, limited his obligation to getting off the track if he knew his peril. The result is, such an instruction is just as advantageous and satisfactory to a plaintiff's attorney in cases like this as a peremptory instruction for the plaintiff would be, and it might just as well be understood now as at any time whether this court intends to approve such a practice. The majority opinion gives effect to it, without so expressly committing the court to the doctrine. I cannot agree to it, even by implication, or permit it to pass in silence. For these reasons, I am constrained to dissent from the majority opinion.

Sherwood, J., concurs herein.

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NOTES.**LICENSEES WALKING ON OR CROSSING RAILROAD TRACK—DUTIES AND LIABILITIES OF RAILROADS.**

**Where License to Use Roadbed as Footpath Is Implied from Use without Objection.**—See generally, *note*, 11 Am. & Eng. R. Cas., N. S., 830.

**Same—Footway over Railroad Property.**—Where a railroad company permits a well-defined footway to be established by such use as the public desires or chooses to make of it, as a convenient footway over their property, and alongside a railroad bridge of such company, to and from a passenger station, and had separated such way by a fence from the tracks, so that it was not subject to the risks and incidental dangers of the railroad,—*Held*, that the railroad company, by such conduct, had exhibited an intention that the footway should be used by the public, and, by such manifestation, had induced and allured the public to its use, and that any one using the way within the purpose manifested was entitled to be protected from dangers to the way resulting from want of ordinary care by the railroad company. *Pennsylvania R. Co. v. Ham-mill* (N. J.), 24 L. R. A. 531.

**Same—Railroad Bridge.**—Where a bridge has been habitually and constantly used for many years by people in the locality as a foot pathway without any objection, notice or warning by the company that it should not be so used, persons walking upon it are licensees and not trespassers. *Hooker v. Chicago, Milwaukee & St. Paul R. Co.* (Wis.), 41 Am. & Eng. R. Cas. 498.

In an action by an administrator against a railroad company for wrongfully causing the death of the plaintiff's intestate, the evidence on behalf of plaintiff tended to show that the intestate was walking over a trestle where the public had been allowed to pass and repass for many years; that defendant's construction train came along very slowly, without giving any notice by sound of whistle or bell, and without any headlight; that it made little noise; that the track was straight for a considerable distance; that, when the deceased saw the train approaching, he tried to get over the trestle and could not, and then tried to get off, and got his foot hung; that deceased was sober at the

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time of the accident; and that the engineer had defective eyesight. The evidence for the defendant was to the effect that the planks had been put on the trestle for the use of its employees only; that there was a notice at a gate, "No admittance"; that the intestate was inside the gate and was drunk at the time; that he had been warned against going upon the track; that he was lying down; that the engineer was competent; and that the headlight was burning. *Held*, that there was sufficient evidence of negligence on the part of the company to justify the court in refusing an instruction; that if the jury believed the evidence introduced by plaintiff, and the uncontradicted evidence offered by defendant, they would find that deceased was guilty of contributory negligence. *Troy v. Cape Fear & Y. V. R. Co. (N. Car.)*, 34 Am. & Eng. R. Cas. 13.

**Where License Not Implied.**—See generally, *note*, 11 Am. & Eng. R. Cas., N. S., 831.

In Illinois, the fact that a railroad company has, without objection, allowed the public to cross its tracks at a place which is not a public crossing, raises no duty on the part of the company towards such person, and a person so crossing the tracks is a trespasser. The evidence showed that for a number of years the workmen in certain freight houses had been in the habit of walking upon the tracks of a railroad company in order to reach their homes for dinner by a shorter route and that this custom had never been prohibited by the railroad company. At the time the deceased was killed he was walking along the track or trying to cross it in a diagonal direction. *Held*, that the deceased was not authorized to walk upon the track by any implied permission of the railroad and must be regarded as a trespasser. *Blanchard v. Lake Shore & Michigan Southern R. Co. (Ill.)*, 18 N. E. Rep. 799.

**Same—Not Implied from Use of Track as Footpath No Duty as to Look-out.**—The right of way of a railroad company is its exclusive property; and the fact that persons have been accustomed to walk on the track does not confer upon the public a right to use it, nor create any obligation on the company to look out for persons using it other than the general duty of lookout for obstructions. *Memphis & Charleston R. Co. v. Womack*, 37 Am. & Eng. R. Cas. 308.

A license to walk on a track cannot be established by proof showing that the place was remote from any station, and that persons living near it had been in the habit of walking on it; that the engineer had seen persons walking on it, though not more frequently than on other portions of the track similarly situated; and that no steps had been taken to prevent such persons from so doing. *Missouri Pac. R. Co. v. Brown (Tex.)*, 18 S. W. Rep. 670.

Where pedestrians use a railroad track as a thoroughfare, despite posted notices and other warnings forbidding it, a license for such use is not established. *Hyde v. Missouri Pac. R. Co.*, 54 Am. & Eng. R. Cas. 157, 110 Mo. 272, 19 S. W. Rep. 483.

**Same—Person Having Business in Freight Office Injured in Freight Yard.**—Where a railroad company provides offices for the transaction of its business accessible from the public streets, the presence, in the freight yard of the company, of a person having business with such offices, is not a necessary incident of his business with the company.



joinder of the husband, and the alleged insufficiency of the allegation of negligence. The demurrer was overruled (G. W. Wheeler, J.). The defendant then suffered a default, and moved for a hearing in damages; filing also a notice of its intention at such hearing to disprove the material allegations of the complaint, to prove contributory negligence, and that the plaintiff jumped from the car without due or reasonable cause, and that the collision was wholly due to the negligence of its co-defendant. The defendant the Fair Haven & Westville Railroad Company had previously suffered a default, and filed a similar notice. Upon the hearing in damages there was one trial as against both defendants, in pursuance of an arrangement of counsel approved by the court. One judgment for substantial damages was rendered against both defendants. From this judgment the defendant the Manufacturers' Railroad Company appealed; the other defendant did not appeal. The trial court (Thayer, J.) made a finding, stating the facts on which his judgment was founded, certain exceptions taken to rulings on the admission of evidence, and the claims made by the appealing defendant on the trial. On all these claims the court ruled substantially as the defendant requested, except upon the claim that no action for negligence would lie against the defendant for its conduct in operating its cars as alleged in the complaint, the claim that judgment could not be rendered on the complaint because it contained "no allegation of due care," and the claims that upon the evidence it did not appear that the defendant was negligent, and that judgment should be rendered for nominal damages only. The appeal assigns error in denying the motion to strike out, in overruling the demurrer, in the rulings on evidence, and in overruling the defendant's claims made upon the trial.

After the completion of the appeal, and within the prescribed time, the plaintiff filed in this court a plea in abatement, on the ground the law did not authorize an appeal from a judgment against two defendants in an action of tort by one defendant without making the other defendant a party, or obtaining from the court an order of severance. To this plea the defendant (the appellant) demurred on the ground the allegation of nonjoinder was insufficient, and because the plea contained no prayer for judgment. The plaintiff then and after the second opening of the court filed a motion asking leave to amend her plea by adding a prayer for judgment. The plaintiff also filed a motion to dismiss the appeal on the ground of nonjoinder of the other defendant. The questions arising on the plea in abatement and motion to dismiss were, by agreement, discussed at the same time with the arguments on the merits of the appeal.

Seymour C. Loomis and Earnest C. Simpson, for appellant.

Walter J. Walsh, for appellees.

Hamersley, J. (after stating the facts). The plaintiff's motion to amend his plea in abatement is denied. Such pleas are entitled to little favor from a court (*Greene v. Society*, 32 Conn. 95, 96), especially from a court, where they can seldom serve any purpose but to deprive an appellant permanently of his rights on a mere technicality. The law of amendments applies to these pleas, but the right to amend must in this court be exercised on or before its second opening. After that time the allowance of an amendment is a matter of discretion, which would hardly be exercised favorably, unless it were apparent that the allowance would really serve the ends of justice. In the present case, certainly, it would serve no useful purpose, because the other averments of the plea are clearly insufficient.

The demurrer to the plea in abatement is sustained. The statute gives the right of appeal from a final judgment to any party aggrieved. A judgment against several persons in an action of tort is several as well as joint. When severed, all rights in further dealing with the judgment, as applicable to himself, belong to each defendant. A severance is made when one, in pursuance of statutory authority, continues the litigation in another court, and the others do not. *Chapin v. Babcock*, 67 Conn. 255, 256, 34 Atl. 1039. When such continuance is by appeal to this court, the other defendants may appear for the protection of their interests, if they deem them involved. The filing of the notice of appeal was notice to this defendant as well as to the prevailing party, and put it so far in the position of an appellee as to entitle it to be heard on all matters appertaining to the appeal. The plea in abatement was the proper mode of presenting the plaintiff's objection to the appeal, and the motion to dismiss is therefore not entertained.

Counsel for the plaintiff was strangely mistaken in supposing he could make two causes of action out of the injury to his client. The separation of his material allegations by the words "second count" was unwarranted and ineffective. The trial court emphasized the fault by its error in ordering the plaintiff to elect on which count she would proceed. The practical effect of the order was to compel the plaintiff to omit an averment she was entitled to make. It was proper to aver that the injury was received in being hurled to the ground in jumping from the car, and also by being hurled to the ground when just ready to jump. She was entitled to allege what was substantially the same fact in different forms, to meet the possible conditions of testimony. Such double allegations are improper only when plainly unnecessary, or one or the other is false, to the knowledge of the pleader. After the erroneous order of the court had been obeyed, the plaintiff, in amending the complaint, might well have altered the phraseology of paragraph 8 so that it should express its evident meaning in more accurate language, but the motion for such reason to strike

out this material allegation was frivolous, and properly denied. There was no error, now available to the defendant, in overruling the demurrer to the amended complaint.

The naming in the writ of Charles H. Brockett as co-plaintiff and husband of the plaintiff Mary L. Brockett was permissible (Fuller v. Railroad Co., 21 Conn. 556, 570; Gen. St. § 987; Haman v. Bank, 42 Conn. 141; Warren v. Clemence, 44 Conn. 309; Wells v. Cooper, 57 Conn. 52, 58, 17 Atl. 281), and furnished no ground for the defendants' demurrer to the complaint.

Paragraph 9 of the complaint states that "the defendants were grossly negligent in not having some means or method to warn each other of the approach of each other's cars, and in approaching a place so dangerous at such a rate of speed as to be unable to have complete control of their cars, and thereby prevent a collision, as the one complained of." This paragraph, in connection with the other facts alleged, contained an allegation of an actionable negligence sufficient in substance. "The duty of a corporation like the defendant to use every reasonable precaution to minimize the danger to the public growing out of its exercise of the special privileges granted it in the use of highways is clear." Murphy's Adm'r v. Railway Co., 73 Conn.—, 47 Pac. 120. The duty to keep sufficient control of its cars, under the circumstances alleged in the complaint, is one which rested on each defendant, and a breach of that duty was actionable negligence. The demurrer also claims that the negligence alleged is not stated with requisite directness and certainty. This defect, if it exists, is one of form, and not of substance, and, in common with all other defects of form, was waived when the defendant abandoned its defence to the action, and submitted to a default.

There is no error in the rulings of the court upon the defendant's claims made upon the trial. The claim that judgment could not be rendered for substantial damages, because the complaint contains no allegation that the plaintiff was in the exercise of due care, is without foundation.

The allegation that the injury complained of was caused by the negligence of the defendant is not established, if in fact the injury was also caused by the negligence of the plaintiff; and in this state the burden of proof is on the plaintiff to show that his negligence was not a contributing cause of the injury. By the general law of negligence, every person is bound to exercise ordinary care in his acts and omissions that may endanger others. If he neglects to do this, he violates a legal duty which he owes to each person who may be exposed to the danger, and the injured party has a right of action against such wrongdoer. But in such case the injured party is subject to the same law, he owes the same duty, and is likewise in fault if he violates that duty. When an injury to one results from the fault of both, the equitable rule would be that each should

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suffer in proportion to his wrong. But, on grounds of public policy, the law has established an arbitrary rule that, when the injury complained of has been caused by culpable negligence of both plaintiff and defendant, it has not been caused by the negligence of the defendant, and so the plaintiff cannot recover for the injury. *Park v. O'Brien*, 23 Conn. 339, 345; *Brown v. Illius*, 27 Conn. 84, 92; *Isbell v. Railroad Co.*, 27 Conn. 393, 406; *Bartram v. Town of Sharon*, 71 Conn. 686, 689, 43 Atl. 143, 46 L. R. A. 144; *The Bernina*, L. R. 12 Prob. Div. 89. This arbitrary rule not only affects a right of action, but operates as a rule of evidence. The fact that the plaintiff's injury was caused by the negligence of the defendant demands evidence that it was not also caused by the plaintiff's negligence. This view logically supports the rule followed in this and some other states, that the burden of proof upon the question of contributory negligence rests upon the plaintiff; and it also logically supports the conclusion that an allegation that the injury to the plaintiff was caused by the negligence of the defendant necessarily involved the allegation that the negligence of the plaintiff did not contribute to the injury. Therefore, in a complaint sounding in tort, to recover for an injury due to the negligence of another, a direct allegation that the injury was caused by the defendant's negligence must involve the allegation that the negligence of the plaintiff did not contribute to the injury; in such case, a separate allegation to that effect is unnecessary. There need be no direct allegation of a fact necessarily implied from other averments. *Lord v. Russell*, 64 Conn. 87, 29 Atl. 242. Where a direct allegation of the exercise of due care on the part of the plaintiff may be proper, as in an action for injuries caused by a defect in a highway, it is sufficient, in substance, to allege facts which show that the plaintiff was in the exercise of due care. In the complaint before us, the fact that the injury was caused by the negligence of the defendant is not directly alleged, but the facts alleged show that the injury was so caused, and that the negligence of the plaintiff did not contribute to the injury. We think the complaint supports the judgment. Even if its averments are not sufficiently clear, the defect is one of form, and not of substance. Such defect is waived unless pointed out in a demurrer, and demurrer of the Manufacturers' Railroad Company failed to specify the defect.

The court rightly overruled the defendant's claim as to what constituted negligence. It is the duty of this appellant to operate its cars in approaching a crossing so dangerous as that described in the complaint and found by the court at such a rate of speed, and under such control, as may be reasonably necessary to prevent a collision with cars crossing its tracks. It is possible that the conditions of the crossing might be such that it would be its duty to bring its cars well nigh to a stop before crossing. The trial court has

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found that the conduct of the defendant under the circumstances of this case, was negligent and in violation of that duty, and was the proximate cause of the plaintiff's injury, to which the negligence of the plaintiff did not contribute. There is nothing in the record to indicate that these findings were affected by any erroneous view of the law. They are therefore final. *Murphy's Adm'r v. Railway Co.*, supra. The rulings on evidence were unobjectionable, and call for no special notice. There is no error in the judgment of the superior court. The other judges concurred.

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v.

## MORGAN L. &amp; T. RY. &amp; S. S. CO.

(*Supreme Court of Louisiana, Nov. 19, 1900.*)

[29 So. Rep. 207.]

**Care Due Person on Track at Crossing—Warnings—Statutory Requirements Not the Sole Measure of Company's Duty.\***—The parties in charge of a railroad train do not perform their whole duty, under all circumstances, by pursuing the regulation method of giving notice by the ringing of a bell, or following out any prescribed mode of giving warning. The precautions to be adopted and the steps to be taken in aid of safety increase as the danger of accident and injury is increased, and their sufficiency is to be gauged by what is called for by the circumstances of each case.

**Same—Same.**—Where a working train upon a railroad backs down upon a rarely-used side track, towards a point in a village street which its people have for years used for crossing the street, simultaneously with the passing of a freight train through the same street along a parallel track, the trainmen on the working train are bound to know of the probability of there being persons detained at or near the side track, or in the vicinity of the crossing, by reason of the passing of the train on the main track; of the danger of their passing with their attention directed to that train; of the great probability of their not hearing or noticing signals which under ordinary circumstances might have sufficiently warned persons of the approach of a train on the side track; of the danger of these signals being mistaken for signals from the train on the main track. They, therefore, should be specially and exceptionally care-

\*As to care to be exercised by railroads at crossings at populous places, see *note*, 13 Am. & Eng. R. Cas., N. S., 499 *et seq.*

As to whether statutory provision regulating the giving of signals at railroad crossings is the sole measure of the railroad's duties in this respect, see *Tessmer v. New York, etc., R. Co.* (Conn.), 15 Am. & Eng. R. Cas., N. S., 164, and *notes*, 173 *et seq.*

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ful to guard against dangers arising from this special situation. If they back the train down to the crossing without giving warnings properly called for by this situation, and in so doing run over and kill a man standing at or near the crossing, whom they were almost forcedly called upon to see if they had been looking in front of them, the railroad company is responsible in damages for their act.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Mary; A. C. Allen, Judge.

Action by Mary Downing against Morgan's Louisiana & Texas Railway & Steamship Company. Judgment for plaintiff. Defendant appeals. Modified and affirmed.

D. Caffrey & Son, for appellant.

Milling & Sanders and John B. Roberts, for appellee.

## Statement of This Case.

Nicholls, C. J. This suit is brought by Mrs. Mary S. Downing in her own right and as tutrix of the minors, issue of her marriage with Isaac E. Downing, deceased. Her demand is based upon allegations: That the defendant company owns and operates a railroad which runs through the parish of St. Mary, and through the populous village of Berwick, in said parish, and runs through its principal street from east to west, dividing the town into that portion lying north of said railroad and that portion lying south of said railroad. That the principal business of the town is carried on in that portion lying north of the railroad, and that all persons living south of said railroad in said town are compelled to cross the said railroad when going to the post office, to the market, and when going to the business portion of said town to transact their ordinary affairs of business. That the railroad company has established a certain crossing for pedestrians over the said railroad in said town, which was accepted and used by the public in a certain way, which shall be shown on the trial hereof, and that the same as thus accepted and used was acquiesced in by the said railroad company. That on the evening of the 25th day of February, 1899, at from 6 to 7 p. m. o'clock, Isaac E. Downing, the husband of the first-named petitioner and the father of the other petitioners, the minor children aforesaid, was returning from that portion of the town lying north of the railroad, where he had been on business, to his home, in that portion of the town lying south of the railroad, where he resided with his family, and that while attempting to cross the said railroad at the public crossing, and to cross the side tracks used in connection with said railroad, the said Isaac E. Downing was run over by a freight or construction train belonging to the said railroad company, with the result that his body was frightfully torn and mangled. That, after suffering intense agony and pain for the period of from four to six hours, he was unable to

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longer bear up against the frightful injuries sustained as aforesaid, and succumbed to them, and departed this life, leaving a widow and three minor children, petitioners. That the death of the said Isaac E. Downing was caused by the wanton, gross, and criminal negligence of the servants and employees of the said railroad company, for this reason: That the employees of the said railroad company backed a freight or construction train, consisting of engine and cars, into the side track on the northern side of the said railroad in said town, without having an employee stationed on the approaching end of said train to give alarm in case of danger; that the train was thus backed into the side track without ringing the bell to give alarm, or displaying any alarm signal or lights, and without any notice whatever of the approach of said train being given, and that the train was thus backed down the incline of the side track and approached noiselessly; that at the time when the said train was being backed into the side track aforesaid the entire train was running backwards, and all the employees of the said railroad company on the said train were at or near the engine, which part of the train was at the greatest distance from the said Downing, and that no one was on or near the approaching end of the said train, which end was the nearest to the said Downing, where they should have been, to give alarm of the approach of the said train; that, at the particular time when and the place where the said Downing was killed, the said railroad company was running another train (a freight train) over the main line of their track, and the engine of the said train was emitting large quantities of black smoke, which, on account of the atmospheric conditions, the blowing of the wind, and the suction created by the rapid approach of the said train, curled above and enveloped the said Isaac E. Downing to such an extent as to obscure his vision very greatly, all of which prevented the said Isaac E. Downing from crossing over the main line as soon as he reached it, and that exercising due care and precaution in getting out of the way of the train running on the main line, thereby, as he supposed, avoiding danger, and not in any manner contributing to the negligence of the said employees, he was run over by the train which was approaching him along the side track, and of whose approach, on account of the wanton and criminal negligence of the employees of said railroad company as aforesaid, he had no knowledge and no warning. That this village is thickly settled, and that the public are continually crossing the said railroad at its said crossing, and that it is necessary, customary, and the law required said railroad company, to place an employee on each end of the moving train that was then being backed in on the side track, to give alarm in cases of danger. That had the requirements of the law been observed, and these precautions as aforesaid taken, then the said Isaac E. Downing would not have lost his life as aforesaid. That the said Isaac E. Downing was only

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54 years of age, was a stout and able-bodied man, in perfect health, and that there existed no apparent reason why he should not have lived 20 or 25 years longer. That he was an engineer by trade. That he made from 1,200 to 1,500 per annum, from which income he supported his family and educated his children, petitioners, and of which support and maintenance and education they were deprived, and are still deprived, for the reasons that the minors, being girl children, of the ages above mentioned, are too young to make a living by their own efforts, and that their mother is unable to support, maintain, and educate them, and at the same time to support and maintain herself. That by the death of the said husband and father, caused as aforesaid by the wanton and criminal negligence of the servants, and employees of the said railroad company, they have suffered great damage, and have been damaged as follows, to wit: That they have been damaged in the sum of \$185 for funeral expenses and doctor's bills. Mrs. Mary S. Downing shows that she has been damaged in the sum of \$7,500 in the loss of his support and maintenance, and \$2,500 in the loss of his society, love, and tender care, and for the great mental suffering caused her by witnessing his death, accompanied as it was by such pain and suffering on his part. The minors aforesaid, represented herein by their tutrix aforesaid, have been damaged in the sum of \$12,000 in the loss of the support and maintenance of their father, and of the education he could and would have given them had he not been killed as aforesaid. They show that they have been damaged further in the loss of the society of their father, and in the loss of his influence, care, and protection, and in the great grief and mental anguish experienced by them in seeing their father in the mangled condition aforesaid, writhing in the agonies of death, in the further sum of \$3,000. Further, that they have been damaged jointly in the further sum of \$5,000 for the intense pain, anguish, and mental agony suffered by the husband and father aforesaid, such pain and anguish and mental agony having been caused by the injuries sustained as aforesaid by the wanton and criminal negligence of the servants and employees of the railroad company aforesaid. They aver amicable demand without avail. They aver that they are entitled to a trial of the issues herein by a jury. The prayer of the petition is for service thereof and citation on Morgan's Louisiana & Texas Railway & Steamship Company; and on final trial they pray for judgments for the amounts and items of damage as above set forth, aggregating the sum of \$30,185, with 5 per cent. per annum interest thereon from judicial demand until paid, and for all costs. They further pray for a trial of the issues herein by a jury.

Defendant, after pleading an exception of "no cause of action," subsequently answered. After pleading the general issue, it averred that it was solely through the imprudence, negligence, and want of ordinary care on the part of the de-



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ceased that the accident which is alleged to have occasioned his death occurred, and, further, that if there was negligence on the part of its employees and officers, which was denied, same was not the proximate cause of said accident, but that the negligence of deceased, contributing thereto, was the proximate cause thereof, and that but for such negligence on the part of deceased the accident would not have occurred. In view of the premises, defendant prayed that plaintiff's demand be rejected and her suit dismissed at her cost, and for general and equitable relief. The issues were tried by a jury, which returned a verdict of \$10,000 against the defendant. The court rendered judgment in conformity with the verdict, and defendant appealed.

## Opinion.

It is conceded that Isaac Downing, the husband of one of the plaintiffs and father of the others, was injured by being run over by a train of cars operated by the defendant, or parties for whose acts it is responsible, and that from and by reason of that injury he came to his death. The disputed points are the facts and circumstances under which the injury was received. The defendant claims that at the moment of the injury Downing was a trespasser upon its right of way, or at best a licensee; that he was guilty of contributory negligence in standing at the place he did when defendant's working train was passing down the side track on the way to its proposed local station for the night; that employees were all in their proper positions at the time, and did everything that was necessary and proper to be done by them as the train approached the crossing near which the deceased was struck; that the bell was rung and the whistle sounded, and the train was moving slowly; and that nothing but Downing's own imprudence, gross inattention, and want of care gave rise to the accident.

The injury occurred a little after 6 o'clock on Saturday, the 25th of February, 1899, on one of the streets of the village of Berwick City. Downing was taken from under the third car of the train, which was moving. One of his legs was severed from his body, and he was otherwise severely hurt. He died the same night at 10 o'clock, having been unconscious except for a very short time after having been taken to his home. Berwick City is an unincorporated village of about 1,000 inhabitants. It lies on the side of Berwick Bay furthest from New Orleans, and opposite to the town of Morgan City. The defendant company's railroad after passing through Morgan City crosses Berwick Bay by a railroad bridge, and passes through, on its way to Patterson, Franklin, New Iberia, and Lafayette, one of the streets of the village referred to. Prior to the building of the bridge, transportation across the bay was by means of a ferry. The lands adjacent to the ferry on the Berwick City side were level, and the tracks of the company on that side approached the ferry landing from Patterson-

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ville or Franklin on a descending grade. When the bridge was built, the situation having changed, a new raised track had to be constructed by the side of the other, and cars passing through Berwick City to the bridge from Franklin, on their way to New Orleans, had to pass through the village to the bridge upon an ascending grade. The old track was not torn up, but was permitted to remain, to be used as a side track for switching purposes, or for parking cars and depositing rails and ties down on the level ground next the old ferry, as occasion might require. The two tracks are almost parallel on the village street; one, however, being considerably higher than the other, and the two together taking up, almost in its entirety, the width of the street. Under what circumstances and conditions the defendant company came to occupy this street with its tracks does not appear. There is no evidence of any expropriation proceedings having ever been taken out, and whether the right of way through the village is through ownership of the fee, under a servitude acquired for a consideration, or simply by acquiescence or gratuitous permission, we do not know. We are not informed under whom and from whom the defendant holds or claims, nor from what time its claims or rights date, relatively to the right of passage by the public over and through the same street. The new or present main track, as parties stand upon it, looking towards Patterson or Franklin, is to the left of the old track (now side track). The latter is referred to throughout as the "north track," and the main line as the "south track." The population on the north and south sides of these tracks is almost equally divided. So far as the evidence in the case goes, the street has been a thoroughfare for the villagers from the time of the creation of the village. It is just as likely that the general public was already in possession of a right of way through and over this village street when the defendant's tracks were placed thereon as that this right of passage by the public should have arisen subsequently to the occupancy of the street by the defendant's road. We cannot assume that the village was only built after the construction of the road.

On the afternoon of the 25th of February, 1899, a working train of the defendant company, which was working at or near Pattersonville, left that place to be placed in position for the night at Berwick City; the sleeping cars and cooking cars of the workmen having been left there from about the 11th of February. The engine of the train was at the Franklin end of the train, and it therefore backed its way down to Berwick. At about half a mile before reaching Berwick it stopped at the point where the side track which we have referred to made its extreme westerly connection with the main line. The switch was opened, and the train backed in until the whole of it had passed onto the siding, and the engine had reached a point from 20 to 30 feet from the main line. There it stopped to enable the brakeman to close the switch. The train then

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backed again until it reached a point on the side track at which certain arrangements had been made so as to enable trains on that switch to pass again, if desired, onto the main line, or to continue down the side track, onto what is called the "spur track," into the streets at Berwick. On this particular occasion the working train passed down into the village on the spur track. At or near the store of one Henry Jacob, a little frame building on the north side of the street, and facing the side track, there was another switch, by means of which cars on the siding at that point could be made to be run down to the old ferry landing on one of three or four tracks. The portion of the side track between the first westerly switch (the switch nearest to Franklin) and the next switch to the east (that by means of which a train on the siding could be made to pass again upon the main track) is generally spoken of in the testimony as the "side track," while the portion between the second switch and Jacob's store is referred to as the "spur track," and we shall so distinguish them. It appears that the market and the principal stores and places of business are on the north side of the street on which these tracks are constructed, and that the people of Berwick have constantly, for many years, crossed the tracks, going from one side of the village to the other. They could not well do otherwise. We have stated that the tracks occupied almost entirely the width of the street. We should add that in making the roadways and embankments thereof the defendant had taken the earth from the street itself, leaving ditches on the right and left of the same. At different intervals these ditches are crossed by bridges to enable parties to pass over onto the tracks, and from one side of the street to the other. One of these bridges is in front of the residence of a Mrs. Thompson, who lives upon the north side of the street, facing the side track, and nearer to Franklin or Pattersonville than Jacob's store. Along the front lines of the properties between Jacob's store and Mrs. Thompson's, and between these front lines and the ditch, there is a banquette or sidewalk, which, under the evidence, is not at all in a good condition, and sometimes impassable. The slope of the embankment of the spur track between Jacob's and Mrs. Thompson's seems to constitute the outer line of the ditch, which is not so wide at Jacob's store as it is nearer to Mrs. Thompson's. Between the ends of the ties of the spur track at Jacob's store and the side of the ditch at that point, and for some 50 or 60 feet or more or west towards Mrs. Thompson's, there is sufficient space for a person to walk between the ties and the ditch; but at that point or distance the space becomes so narrowed by the widening of the ditch that its outer edge runs practically up to the ends of the ties, and a person leaving Jacob's store and walking by the side and on the outer edge of the ties is forced at this point, in order to proceed further in that direction, and to reach the crossing in front of Mrs.

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Thompson's, to pass upon and along the spur track itself. The evidence shows that, while it is feasible to walk alongside the ties up to what may be called this "turning off" point, yet in point of fact the spur track itself from in front of Jacob's up to the Thompson crossing is the usual route followed, though there is sufficient walking along the edge to have caused a well-defined and visible path.

On the afternoon in question, Isaac Downing, who lived on the south side of the street, went to the market, on the north side, to obtain his family supplies. Having done so, he started homewards. Going to Jacob's store, he crossed to the side of the spur track, there turned, and went westward, in the direction of the Thompson crossing, near which, but on the opposite side of the street, his residence was. It is a disputed point whether when he turned at the track he immediately went on it, and walked upon it until he was struck, or whether he walked along the path by the side track up to the "turning off" point, and then went inside of the rails of the spur track, or upon the edge of the ties. Be this as it may, he did not reach the usual point of crossing at Mrs. Thompson's; for a freight train passing on the main track, on its way to New Orleans, seems to have caused him to stop and await its passing. While so standing, the working train backed down through the side track into the spur track, struck him, and ran over him and injured him, as before stated. This occurred a little after 6 o'clock in the afternoon. Defendant does not pretend that there was any light upon the end of the caboose as the train backed down upon the spur track, nor that any signal was given to the engineer to stop, either by the conductor or the brakeman, until after Downing was struck. Defendant's witnesses (the conductor, the engineer, the fireman, and the two brakemen upon the train) all admit that they did not know of Downing's presence at or near the track, and testify that they did not see him until after the accident. Just as soon as it occurred the conductor signaled the engineer, who stopped the train at once, as promptly, after receiving notice, as we think he could have done. There is no blame to be attached to the engineer's conduct on the occasion. We have, therefore, to look to the conduct of Downing himself, and to that of the conductor and the brakemen. Downing is dead, and never recovered sufficiently to give his own version as to how the accident occurred. We think it well established that he was taken entirely by surprise by the near approach of the car. One or two witnesses say that he became aware of its approach just prior to being struck, and made a motion to escape; but we think this very doubtful, in view of statements of other witnesses. We do not think that the question as to whether there should have been a light at the rear end of the caboose as the train backed down plays any part in the decision of the case. In the first place, we think it was not sufficiently dark when the accident

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occurred to have called for the placing of a light at that hour upon the end of the car, even if it had been upon the main track, as objects were distinctly visible at the time; and, in the next place, the train upon the siding was to be stopped in a few moments for the night, and that particular method of giving a warning was then scarcely required. The only witnesses who speak of Downing's position at the time of the accident are those of the plaintiffs, who place him standing at the time on the edge of the ties outside of the rail, on the north side of the spur track (the rail next to Jacob's store and the Thompson residence), and facing the main track, his attention evidently directed to the passing freight train. It is easily understood how Downing may not have seen the working train or known of its approach, but it is difficult to understand how neither the conductor, who declares that he was in the side door of the caboose, at the right hand, and looking in the direction towards which the train was backing, nor Houghton, the brakeman, who declares that he was on the top of the caboose, left-hand side, and also looking in the direction towards which the train was moving, should have failed to see Downing. There was certainly enough light to have seen him, and the space within which he was bound to have been almost forcedly brought him within the line of vision of one or the other of these persons. If either had declared that he had seen him somewhere in the neighborhood of the track, though not upon it, and that his position when struck must have been the result of a sudden, unanticipated movement of Downing, from the side, we could understand the situation; but that neither Casey nor Houghton should have seen him at all can be accounted for only by the fact that one or the other or both were not looking at the time in the proper direction. Neither Casey nor Houghton attempts to explain why they did not see Downing. Plaintiffs' counsel assert that they did not see for the very simple reason that they were not in their proper places, and not in a position to see, but we do not think this position maintainable. We think that Casey and Houghton were each, at the time of the accident, in the places which they respectively testified to having been at at that time; but the mere fact of their having been at those places would amount to nothing, unless they performed the duties for which they were placed there. There were strong reasons calling for exceptional vigilance on their part. The spur track below Berwick had been used, it is true, as a camping ground for the working train of the defendant since the 11th of February, a portion of the cars being left there all day and all night from that date, while another portion would go out in the morning, return at noon, and again go out to return at dark; but, none the less, it had been for a long while seldom used,—so seldom as to have caused its presence to have ceased to give rise to any suspicion of probable danger. The track had been used both for a

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crossing, and for walking along in order to reach the crossing, for so generally and for so long a period that the fact must necessarily have come to the knowledge of the company, and it could not ignore that fact in the handling and management of its trains. On this particular afternoon the working train backed down the spur track simultaneously with the passing along, opposite to it and upon the main track, of a heavy freight train, the ringing of whose bell as it passed along, together with the inevitable noise resulting from its moving, were bound, to some extent, at least, to conceal the approach of another train on the other line of track. Of this fact the conductor of the working train must certainly have been aware, and he should have been specially and exceptionally careful to guard against the danger arising from this special situation. He must have known of the likelihood of there being persons detained at and in the vicinity of the crossing by reason of the passing of the train upon the main track, of the danger of their having their attention diverted to that train, of the great probability of their not having noticed or heard signals which under ordinary circumstances might have sufficiently warned persons of an approaching train on another line, or of these signals being mistaken for those of the freight train. He must have known that the end of his train, when it commenced moving back through the second switch, was almost within striking distance of any one at or near the crossing, and that their opportunity for discovering the approaching cars and avoiding danger was very little; and both he and Houghton should have given their fixed and undivided attention to what was just behind their train. They could not possibly have done this. It is more than probable that, forgetting how much might happen in a few seconds of time, the attention of one or the other was directed for a little while to the freight train, and that short period of inattention or carelessness is responsible for the accident.

It will not do to say that the bell was constantly rung from the time of entering the first switch; that this was sufficient, and that, if Downing did not hear it, it was simply his misfortune and that of his family; that the trainmen had nothing to do with the train on the main line. It is a mistake to suppose that by pursuing the regulation method of giving notice by the ringing of a bell, or following out any particular prescribed mode of giving warnings, parties in charge of a railroad train perform their whole duty under every contingency or on all occasions. The precautions to be adopted and the steps to be taken in aid of safety increase as the danger of accident and injury is increased, and their sufficiency is to be gauged by what is called for by the special circumstances of each case. It is very true that the conductor and brakemen of the working train were under no responsibility for the handling of the train upon the main line; but it does

Care Due Person  
on Track at  
Crossing—Warn-  
ings—Statutory  
Requirements  
Not the Sole  
Measure of Com-  
pany's Duty.

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not follow from this that the management of their own train was to be totally independent of what other trains might be doing, or where they might be,—particularly those belonging to the same company. A number of witnesses testify that the fireman of the engine on the spur track rang his bell constantly. A number of others deny that fact. Casey, the conductor, says he heard it from where he was standing, in the side door of the caboose, while Houghton, the brakeman who was on the top of the caboose, testified that he did not hear it. We think he did ring it, but that it was probably confounded with the ringing of that of the freight train, or that its noise was drowned and confused by other noises. The whistle of the train was not blown after it entered upon the spur track, or, indeed, after it entered into the switch proper. We think it would have been a proper precautionary measure to have blown it just before or as the train passed onto the spur track. The mere presence of a train of cars above on the switch proper was not calculated to give notice that the train would come upon the spur track. There were trains upon that switch constantly passing on and off the main track, but the going down of a train upon the spur track was exceptional. The most effective method of avoiding this particular accident would have been for Casey, from the side of the caboose, or Houghton, from the top, to have called to Downing from their respective places. He might have been forced, for safety, to have jumped into the ditch, but he would have been saved by so doing from bodily injury.

Defendants say it was as much Downing's duty to have seen the approaching train and to have gotten out of the way as it was the duty of the trainmen to have seen him and avoided the accident. They argue the case from the standpoint of Downing's having been a trespasser on their track, and at best a licensee, and assert that they were under no obligation to keep a lookout for any one at the place he chanced to be. It has, indeed, been sometimes said that trainmen are under no obligation to keep a lookout for trespassers, but that statement is entirely too broad. Parties in charge of a railroad train are under an obligation to keep a lookout all the time, though they are not held to as rigid a lookout for trespassers where they would not reasonably be expected to be found as they are where their presence would not only be a possibility, but a probability. Though the contractual relations between carrier and passenger and the relations between employer and employees affect to some extent the question of the care which trainmen must exercise, it cannot be contended that trainmen are absolved from all duty to trespassers prior to the time when they are actually discovered at or near the tracks, in a position of peril. Our Code (Rev. Civ. Code, art. 666) declares that "the law imposes upon proprietors various obligations towards one another, independent of all agreements." On the same principle are

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imposed upon railroad corporations various obligations to the general public, independently of all agreements or special relations. In *Nave v. Railroad Co.*, 96 Ala. 264, 11 South. 391, referred to in *Provost v. Railroad Co.*, 52 La. Ann. 1902, 28 South. 309, the supreme court of Alabama declared that "to run a train at a high rate of speed, and without signals of approach, where trainmen have reason to believe that there are persons in exposed positions on the track, as over an unguarded crossing in a populous district of a city, or where the public are wont to pass on the track with such frequency and numbers,—facts known to those in charge of the train,—those in charge will be held to a knowledge of the probable consequences of maintaining great speed without warnings, so as to impute to them reckless indifference in respect thereto, and render their employees liable for injuries therefrom, notwithstanding there was negligence on the part of the injured, and no fault on the part of the servants after seeing the danger. The doctrine is not based on the idea that they ought sooner to have observed the danger, however, but on the ground that they knew of its existence,—of the presence of people in positions of peril, as a matter of fact, without seeing them at all in the particular instance." It would not be necessary, to bring about the liability that the Alabama court here refers to, that the producing cause of injury should be the running of a train at a high rate of speed, coupled with an utter absence of signals. Though the train might have been running slowly, and though there may have been signals given of some kind, the railroad company should not be relieved of responsibility, under the circumstances, if the signals were manifestly insufficient to have met the requirements of a proper warning, if the cars, even running at a slow rate, would, for want of a proper warning, have inevitably run over and injured the persons at the crossing. The defendant argues this case from the standpoint of *Downing* having been a trespasser, or at best a licensee, upon its property. We are not prepared, under the evidence in this case, to say that this argument is justified by the facts, and that *Downing* at the time of the accident occupied quoad the defendant the position of either a trespasser or a licensee. As matters stand, and as we view them, we are authorized to dispose of the issues before us from the standpoint of equality of rights and reciprocity of obligations, modified and controlled by the course which each party was called upon to pursue under the exact conditions of the particular case. In this instance the necessity of rapid transit, an element frequently referred to as calling for subordination in the use of streets or highways by individuals to their use by railroads or railway corporations was not present; for the accident took place upon a rarely-used side track, by the action of a working train which was going into quarters for the night, the work of the day having been completed. It could well have been held up after its entrance through the



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first switch until the train upon the main line, with its attendant confusing noises, had passed by. It is contended that Downing was not justified in "standing" or "loitering" upon either the track or the crossing, and that he should have "stopped, looked, and listened" before passing upon or crossing the track. There is nothing in the record to show that he may not have done this, and the distance between the point where the train passed from the side track to the spur track up to the point where the accident occurred was too short, under the circumstances of this case, to have caused a failure to look again while the train was moving over that space to create a presumption of negligence. It is true that streets are, and crossings have been declared, no proper places for stopping and loitering, but the stopping of Downing was the result of the blocking of his way by one of defendant's passing trains. We do not think that the fact that the accident occurred some feet short of a crossing makes any material difference in the situation, from what it would have been had it taken place directly at the crossing. Downing was as plainly visible at the point where he was standing, and injury to him was as easy, and in fact more easy, of avoidance, as if he had been directly at the crossing. We do not think the particular place at which he was standing relatively to the crossing was the proximate cause of the injury in this case. He would unquestionably have been killed had he been at the crossing. The defendant cannot complain of his having to cross upon the track to reach the crossing from the path along the side of it, as it had cut off further extension to the path by the widening of the ditch at that point, and bringing its side next to the rails, up to the outer edge of the ties.

We coincide with the jury in opinion, and the district judge, that the injury to Downing, and his resulting death, were due to the fault of the defendant, and this conclusion carries with it its legal liability to repair the damage resulting from it. Rev. Civ. Code, art. 2315. We have, therefore, to consider what that damage is, and to whom it is due. The article of the Code which we have just cited declares that "every act whatever of man that causes damage to another, obliges him by whose fault it happened, to repair it," and that "the right of this action shall survive in case of death in favor of the minor children and widow of the deceased or either of them." In this case the deceased lived for several hours, and has left surviving him a widow and four minor children (daughters). In *Castille v. Railroad Co.*, 48 La. Ann. 330, 19 South. 333, we had occasion to refer to this surviving action as one *ex delicto*. In article 1934 of the Revised Civil Code it is declared that: "Although the general rule is that damages are the amount of the loss the creditor has sustained, or the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on

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the pecuniary loss or the privation of pecuniary gain to the party; where the contract has for its object the gratification of some intellectual enjoyment whether in religion, morality, or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties; yet damages are due for their breach; a contract for a religious or charitable foundation, a promise of marriage or an engagement for a work of some of the fine arts are objects and examples of this rule. In the assessment of damages under this rule, as well as in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury, while in other cases they have none but are bound to give such damages under the above rules [fixed by preceding clauses of the article] as will fully indemnify the creditor whenever the contract has been broken by the fault, negligence, fraud or bad faith of the debtor." Though, under the provisions of this article, exact indemnity is not to be made the test of damages due for an offense or quasi offenses, and much has to be left to the discretion of the judge or the jury, they should not act arbitrarily in this matter. We think it, therefore, proper that the parties should be permitted to introduce testimony as to "compensatory" damages, not to the end of fixing conclusively thereby the measure of damages, but affording some guide in the ascertainment of what would be a reasonable and judicious exercise of the right of assessment. *Railroad Co. v. Spencer* (Colo. Sup.) 61 Pac. 609. The deceased was a man between 52 and 54 years of age, exemplary in his habits and in perfect health. He was energetic, laborious, and prudent, and a skilled mechanic, earning from twelve to fifteen hundred dollars a year. He was a kind and affectionate husband and father, supplying his wife and children, to the full extent of his ability, with everything needful for their comfort and good. No tables of mortality were introduced in evidence, but witnesses declared that he could reasonably have looked forward to "reaching a ripe old age." The wife had and still has some little property of her own, but not near enough to either support herself or the family. We are of the opinion that the verdict of the jury and the judgment therein rendered are correct, except as to the amount of the damages awarded to the plaintiffs. We are of the opinion that that amount is too large, and that it should be reduced to \$6,500. For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is, amended by reducing the amount for which judgment is rendered in favor of plaintiffs against defendant from \$10,000 to \$6,500, and that as so amended the judgment be affirmed. Costs of appeal to be paid by appellees.

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## ST. CLAIR

v.

KANSAS CITY, M. &amp; B. R. Co.

*(Supreme Court of Mississippi, March, 1900.)*

[28 So. Rep. 957.]

**Condition on Face of Ticket—Signature—Estoppel.\***—Where defendant's agent sold plaintiff a ticket over connecting lines, which contained a provision on its face that the defendant acted only as agent, and was not responsible beyond its own line, and the condition was not signed by plaintiff, his acceptance and use of the ticket estopped him from taking advantage of his omission to sign.

**Tort of Connecting Carrier—Liability of Receiving Line.\***—Where defendant's agent sold plaintiff a ticket, which contained a provision that defendant acted only as agent, and was not responsible beyond its own line, in the absence of proof of partnership between the lines defendant was not liable for a tort of the connecting line.

**Same—Enforcing Quarantine Regulations of Carrier—Representations of Agent.**—Where there was no evidence that defendant's agent in any way deceived plaintiff, or had knowledge that any quarantine regulations existed in a state through which plaintiff must pass, the fact that he sold plaintiff a ticket through said state did not render defendant liable for damages occasioned by the wrongful act of a connecting line in enforcing its quarantine regulations.

Appeal from circuit court, Lee county; Eugene O. Sykes, Judge.

Action by Elijah C. St. Clair against the Kansas City, Memphis & Birmingham Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. D. Anderson and W. H. Clifton, for appellant.

J. W. Buchanan, for appellee.

Calhoun, J. Mr. St. Clair's declaration charges that on September 20, 1897, the ticket agent of defendant railroad company, at Tupelo, Miss., told him he could sell him a ticket to Tallahassee, Fla., by a route he could travel "without hindrance from quarantine regulations"; that, relying on this assurance, he bought the ticket, was transported over appellee's line (the initial line) to Birmingham, Ala., where, according to his ticket, he took the Louisville & Nashville Railroad,

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\*See notes at end of case.

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and by it was taken to Montgomery, Ala., where quarantine officers, aided by the officers of the Louisville & Nashville Railroad Company, took him in charge, and carried him to a quarantine station, and detained him there until "some time in the night of the day of his arrival there"; that he was then carried by the officers of the Louisville & Nashville Railroad over its line to Mobile, Ala., which city he found infected with yellow fever, and thereupon left the same, and went to St. Louis, Mo., from whence, after the quarantine restrictions were removed, he went to Tallahassee, his original destination. He further charges that when he bought this ticket quarantine "was in force in the state of Alabama, of which defendant's agent had full knowledge at the time, and of which he (the plaintiff) was ignorant." His ticket had on its face these words: "In selling this ticket this company acts only as agent, and is not responsible beyond its own line." He did not sign, or expressly assent to, the ticket contract, which was, in effect, that he agreed to it in consideration of its sale for a reduced rate; but his acceptance of the ticket, and use of it, as shown by the proof, prevent him from taking advantage of his omission to sign. If the plaintiff had taken a car of the Plant System at Montgomery, according to the call of the coupons of his ticket, he would have gone to Tallahassee without obstruction. But it seems, according to his testimony, that he was, by the quarantine officers, aided by a conductor of the Louisville & Nashville Railroad Company, put on a car of that line, and this caused all his trouble. We fall in line with the great weight of authority that on such a ticket the initial line is not responsible for the torts or negligence of any of the connecting lines of the route indicated on the ticket, without proof of partnership between the roads, and there is no proof of this here. The initial line, it is true, could be held liable if its agent, with knowledge of quarantine obstructions, nevertheless induced the purchase. But there is nothing in the record showing this, or even tending to show it sufficiently for any court to let a verdict based on it stand for a moment. On the contrary, the proof is that the plaintiff himself was in Tupelo three days before he bought the ticket, and did not know of the quarantine, that other citizens there did not know of it, and that the selling agent did not know of it. The law deals with men in the multiplied transactions of life on the assumption that they are of average intelligence, unless the contrary is shown; and it is plain there was no intent or attempt to deceive the plaintiff. Both he and the agent and the people of Tupelo were in ignorance of any quarantine in Alabama against that portion of Mississippi, and the evidence leaves it in doubt whether in fact there was any as to North Mississippi; and, if he had noticed his coupon, and insisted on taking a car on the Plant System, he would have been free from any obstruction. In this case our con-

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clusion would be the same whether the ticket was full as to price paid for it, or sold at reduced rates. Affirmed.

## NOTES.

**Tickets—Validity of Printed Conditions.**—See *Watson v. Louisville & N. R. Co.* (Tenn.), 18 Am. & Eng. R. Cas., N. S., 115, and *foot-note*.

**Liability of Carrier Selling Ticket for Injuries to Passenger While Being Carried by Another Company.**—See *Mathews v. Atchison, etc.*, R. Co. (Kan.), 12 Am. & Eng. R. Cas., N. S., 255, and *foot-note*; *Barkman v. Pennsylvania R. Co.* (N. J.), 12 Am. & Eng. R. Cas., N. S., 250, and extensive *note*, 252 *et seq.*

YAZOO & M. V. R. Co. *et al.*

*v.*

## ADAMS, STATE REVENUE AGENT.

(*Supreme Court of Mississippi, March, 1899.*)

[28 So. Rep. 956.]

**Removal of Cause—Filing of Petition.**—A petition for the removal of a cause to the United States court, filed after it has been reversed on appeal, comes too late.

**Exemption from Taxation—Consolidation.\***—Railroad companies which have consolidated cannot claim protection from taxes accruing before the overruling of a decision of the supreme court recognizing exemptions from taxation on the ground of reliance on such decision, where the taxes sued for accrued after their consolidation, by which they lost their exemption from taxation, if any they had.

**Same.**—In a proceeding against a railroad company for the collection of taxes, a contention that, as Code 1880, § 598, recognized an exemption granted to another railroad company, it must have recognized an identical exemption contained in defendant's charter, is untenable where the exemption recognized was granted by charter before Const. 1869, when the legislature had power to grant an irrevocable exemption, and defendant's charter was granted after the constitution was adopted, by which all railroad property was subjected to taxation the same as that of individuals.

**Same.**—Code 1880, subjecting all railroads to ad valorem taxes, and providing that a certain road might escape the ad valorem tax by paying a certain privilege tax, repealed the previous grant of an exemption to such road from taxation, though no private act not revised and brought into the Code was to be affected by its provisions; since, as the privilege tax was granted such company as a means of escaping the ad

\*As to whether a railroad company's right to exemption from taxation is lost by reason of its consolidating with another company, see *Yazoo, etc., R. Co. v. Adams* (U. S.), 20 Am. & Eng. R. Cas., N. S., 1, and extensive *note*, 20 *et seq.*

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valorem tax, it was intended to subject such road to the ad valorem taxes unless it embraced the conditional exemption by paying the privilege tax.

**Same—Repeal of Charter.**—Code 1892, subjecting all railroads to taxation, repealed exemptions from taxation granted to a railroad company by a previous charter.

Appeal from circuit court, Hinds county.

Action by Wirt Adams, state revenue agent, against the Yazoo & Mississippi Valley Railroad Company and others, to recover certain back taxes. From a judgment for plaintiff, defendants appeal. Affirmed.

For an opinion on a former appeal, see 24 South. 200.

After the mandate of the supreme court was issued to the circuit court, two other suits for taxes assessed against the same property for the years 1896 and 1897, respectively, were consolidated. Defendants applied for a removal of the cause to the United States court. The application was denied. Defendants then applied for a continuance, which was refused. Defendants then filed certain pleas, which were stricken out. Defendants then withdrew the pleas previously filed by them, and refused to plead further, and judgment nil dicit was entered for the taxes from 1892 to 1897, inclusive, from which judgment the defendants appealed.

Tim E. Cooper and Edward Mayes, for appellant.

J. A. P. Campbell, R. C. Beckett, and F. A. Critz, for appellee.

Whitfield, J. The petition for removal of the cause to the federal court was properly denied. The decisions of the United States supreme court, cited in briefs of counsel for appellee put this at rest. Kansas City, etc., Railroad Co. v. Daughtry, 138 U. S. 303, 11 Sup. Ct. 306, 34 L. Ed. 963; Tennessee v. Bank, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; Railroad Co. v. Texas, 170 U. S. 226, 18 Sup. Ct. 603, 42 L. Ed. 1017. The application for continuance was properly overruled. The court's action in striking out the special pleas stricken out was correct, for the obvious reason that they presented no defense to the action, in whole or in part. The former opinion of this court in this case settled definitely and conclusively all the issues involved, and the special pleas are, in effect, nothing else than an effort to have the circuit court disregard that opinion. The futility of that sort of pleading needs no comment. These and all the other matters of practice and procedure assigned for error were correctly settled by the court. The former opinion of this court in this cause, and its opinion on the motion to strike that opinion from the files, dispose defectively of such of these matters as are not here specifically adverted to.

Removal of Cause  
—Filing of  
Petition.

## Yazoo &amp; M. V. R. Co. v. Adams

So far as concerns the argument that the appellants relied on the case of Mississippi Mills v. Cook, 56 Miss. 40, and that, if the overruling of that case is correct, nevertheless the appellants should be protected from taxation accruing before the overruling of that case, it is enough to say that question is not material here, since all the taxes here sued for accrued after the consolidation of October 24, 1892, and the appellants were expressly held to have lost their exemption, if any they had, by their own voluntary act of consolidation. That was the first and main ground on which our former opinion was distinctly rested. It must be too clear for serious disputation, in this view, that all discussion of the case of Mississippi Mills v. Cook is wholly unavailing as to these taxes. Moreover, the twenty-first section of the Mobile & Northwestern charter was not passed on in Mississippi Mills v. Cook, and we held in our former opinion that its constitutionality was never squarely presented as the point for decision until the former judgment in this case. Whatever merit there may be in this line of argument in a proper case, it is clear that here it has, by reason of the fact of the consolidation when and as it occurred, no room for play.

The last proposition which we notice is the one that the Lambert Case, in 70 Miss. 781, 13 South. 33, was erroneous, and ought not to be followed in its announcement that the Code of 1880 repealed the exemption here claimed. It was said, *inter alia*, that the Mobile & Ohio Railroad Company had an identical exemption with the twenty-first section of the Mobile & Northwestern charter, and that section 598 of the Code of 1880, by providing for "a sworn statement of the capital expended in the construction of its road," recognized the exemption as meant by this section 598 to furnish the state with the means of knowing when the Mobile & Ohio Railroad Company should become liable to taxation; and that, since it recognized the Mobile & Ohio Railroad Company's exemption, of course it must also have recognized the alleged identical exemption of appellants. Such was the argument gravely pressed upon the court. It is singular that learned counsel overlooked the easy and overwhelming answer springing from the fact that the twenty-first section of the Mobile & Northwestern charter was granted by an act of the legislature passed in 1870, after the constitution of 1869 was adopted, while the charter of the Mobile & Ohio Railroad Company was granted in 1848, 21 years before that constitution was adopted, at a time when the legislature had full power to grant, so far as any constitutional restriction was concerned, an irrevocable exemption.

But it is said that section 8 of the Code of 1880 provides that "no private act not revised and brought into this Code

shall be affected by its provisions," and that general laws as to taxation ought not to be held to repeal private grants of exemption, unless expressly so stated.

Same.

The principle is correct enough. But we think the alleged exemption of the Natchez, Jackson & Columbus Railroad Company expressly repealed. There were two bills of injunction in the Lambert Case,—rather, there were two cases. The court distinctly held that this exemption from taxation was an exemption both from ad valorem taxes and privilege taxes. Now, the scheme of railroad taxation propounded by the Code of 1880 was primarily to subject "each railroad owning and operating a railroad in this state" to ad valorem taxes. That scheme is set forth in sections 597-606 of the Code of 1880, inclusive. But, secondarily, and as a substitute, each railroad was permitted by sections 607 and 608 of that Code to escape ad valorem state and county taxes by paying the privilege tax named in section 608. Now, the Natchez, Jackson & Columbus Railroad Company is expressly named in section 608, and required to pay a privilege tax of \$30 per mile, if it would escape ad valorem state and county taxes. Manifestly, no one can be found who would dispute the proposition that the exemption from privilege taxes of that railroad was expressly repealed by section 608. But, since this privilege tax was provided only secondarily, and as a means of escaping the ad valorem state and county taxes due by each railroad in the state primarily imposed by section 597 et seq., it is plain that all the sections taken together expressly provide that the Natchez, Jackson & Columbus Railroad Company was to pay ad valorem taxes, state and county, unless it embraced the conditional exemption therefrom by paying the privilege tax assessed by section 608 eo nomine against it. There is no escape from this reasoning. If it be asked why, if the Natchez, Jackson & Columbus Railroad Company was expressly named in section 608, it was not so named in section 597 et seq., the obvious reason is that it was necessary to expressly name it in imposing privilege taxes, since each railroad paid a different privilege tax; but it was unnecessary to name it in imposing ad valorem taxes, since the rate there was the same for all. And this leaves out of view whatever of force there may be in the suggestion that the phrases "each railroad," "every railroad," etc., might be effective to include this railroad, with all others, as fully as if named in section 597. But as to this we say nothing.

Finally, it is said that this twenty-first section was given the Louisville, New Orleans & Texas Railroad Company by independent grant in 1882, by its proper charter, after the Code

Same—Repeal of  
Charter.

of 1880 had been adopted. But, if the Code of 1880 had the effect, as held in the Lambert Case, to repeal by its provisions this section as applied to the Natchez, Jackson & Columbus Railroad Company, then a fortiori, did the more emphatic provisions of the Code of



## Walker v. Price

1892 have the effect to repeal the same section as applied to the Louisville, New Orleans & Texas Railroad Company. This last company could not be named in the Code of 1880, since it did not come into existence until 1882. It will be remembered that this third ground of our former opinion,—that this alleged exemption was repealed by legislation,—if it ever had a valid existence, was wholly uninfluential with the circuit judge on this second trial below, since it was for the first time made part of the opinion when the opinion in full was written and filed, which was several months after the trial in the circuit court. It is perfectly obvious, therefore, that the mere adding a new reason for the decision, which reason did not influence the second trial of the case, in no respect prejudiced the appellants in that trial. We discover no error, and the judgment is affirmed.

Woods, C. J., while recognizing the authority of the former decision to the effect that the consolidation cut off the exemption, and not, therefore, dissenting, adhered to the view formerly entertained by him.

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WALKER *et al.*

v.

PRICE.

*(Supreme Court of Kansas, Dec. 8, 1900.)*

[62 Pac. 1001.]

Round-Trip Ticket—Printed Condition as to Time Limit as Written Contract—Parol Evidence.\*—A round-trip railroad ticket, from Woodward, Ind. T., to Wichita, Kan., and return, contained the following printed on its face: "In consideration of the reduced rate at which this ticket is sold, it is hereby agreed that it will not be good for going passage after midnight of the date named in attached coupon, nor for return passage after midnight of date punched in margin hereof." The date referred to, indicated by punch marks, was May 5, 1894. Plaintiff used the going portion of the ticket from Woodward to Wichita within the time limit. She started on her return to Woodward on May 27, 1894,—22 days after the time limit had expired, and was denied the right to travel on the ticket. *Held*, that the ticket was not ambiguous as to its terms, nor the conditions doubtful in their meaning, and that the acceptance of the same and its use constituted a contract between the carrier and passenger, which, being in writing, could not be contradicted or varied by parol evidence.

Case Distinguished.—*Railroad Co. v. Rodebaugh*, 15 Pac. 899, 38 Kan. 45, distinguished.

(Syllabus by the Court.)

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\*See notes at end of case.

Walker v. Price

Error from court of appeals, Southern department, Central division.

Action by Lena Price against Aldace F. Walker and others. Judgment for plaintiff was affirmed by the court of appeals, and defendants bring error. Reversed.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiffs in error.

J. D. Houston, for defendant in error.

Smith, J. On the 27th day of May, 1894, plaintiff below, Lena Price, took passage at Wichita on one of the passenger trains of the Atchison, Topeka & Santa Fe Railroad Company, then operated by receivers, intending to ride thereon to Woodward, Ind. T. After the train had started, she presented to the conductor the return portion of a ticket from Wichita to Woodward, Ind. T.

She was told by the conductor that the time limit of the ticket had expired, and that she would have to get off at Derby, the next station. This she did, under what the jury found to be "forcible persuasion." The petition of plaintiff in the court below alleged in general terms that she was rightfully riding on the defendant's train as a passenger for hire, and entitled to be carried from Wichita to Woodward, Ind. T.; that she was directed and compelled, without right or justice, and against her consent, to leave the car and train, and was, by the conductor, negligently and wrongfully ejected therefrom, to her damage, etc. On the trial, Frank Price, a brother of plaintiff below, testified, over the objections of defendants, that he had purchased the ticket for his sister at Woodward, Ind. T., for the round trip from the latter place to Wichita and return; that he asked and paid for an unlimited ticket, and that he did not notice the punch marks thereon; that he saw it was from Woodward, and gave no more attention to it. There was no testimony showing that the witness Price, who bought the ticket, told his sister that the same was unlimited; and the jury, in response to a particular question of fact, answered that he did not inform her of the conversation had by him with the ticket agent at Woodward. There was a verdict and judgment for the plaintiff below, which was affirmed by the court of appeals.

Counsel for plaintiffs in error contend, and have cited many authorities to sustain their position, that the conductor must ascertain the rights of a passenger to travel from the ticket alone; that, a ticket being presented to him which showed that a prior right of the passenger to travel had expired, he was fully justified in putting plaintiff off the train, and his justification exempted the company (his employer) from liability; that, the expulsion being rightful, if the plaintiff below

Round-Trip  
Ticket—Printed  
Condition as to  
Time Limit as  
Written Con-  
tract—Parol  
Evidence.

## Walker v. Price

had bought and paid for an unlimited ticket, and was furnished a limited one by the agent of the company, her remedy was an action for breach of the contract to carry, and not in tort. This contention is combated by counsel for defendant in error, and many cases cited holding that, while the conductor himself in such case may be exonerated from liability, the plaintiff having bought an unlimited ticket, the corporation is liable for her ejection from the train, notwithstanding that the conductor had no other guide for his conduct towards the passenger than the language of the ticket, and that a recovery is not restricted to damages for breach of contract. The cases are not at all harmonious on this question. 4 Elliott, R. R. § 1594. In our view of the law applicable to the facts presented in the record, it is unnecessary to decide which side is right in its contention on this question. The plaintiff below had the round-trip ticket in her possession for about five weeks, and within the limit of time stamped on the going part of the same she traveled from Woodward, Ind. T., to Wichita. The time limits were plainly indicated on the ticket, and she was in no manner deceived as to its conditions, for nothing had been said to her intimating that when the ticket was purchased the agent of the company stated it was unlimited. She could have no grounds to doubt that the time limit expressed in the ticket was binding on her, and no reason whatever to believe that the conditions thereof had been waived by the company or its agent. The conductor also was in ignorance of any alleged contract or agreement different from that printed on the ticket. Much stress is laid on the fact that the ticket was unsigned at the place left for signature on the margin. The following language is printed thereon: "In consideration of the reduced rate at which this ticket is sold, it is hereby agreed that it will not be good for going passage after midnight of the date named in attached coupon, nor for return passage after midnight of date punched in margin hereof, and that it is strictly nontransferable. Conductors will take it up and collect full fare if presented by other than the person whose signature is hereon." The evident purpose of requiring this ticket to be signed was to render it nontransferable, and to identify the purchaser. The lack of a signature did not relieve the holder from an observance of that condition which required the ticket to be used for return passage before the date punched in the margin. In *Dangerfield v. Railway Co.* (Kan. Sup.) 61 Pac. 405, it is said: "Limited round-trip tickets, like the one presented by *Dangerfield*, are in common use throughout the country, and the conditions written upon the face of such tickets, and which constitute the contract between the parties, are not unreasonable or invalid. \* \* \* Attention is called to the fact that the original purchaser did not sign the ticket when it was issued, but it is clear that his failure to sign did not eliminate the conditions of the contract. If these were binding upon the company,

they were equally binding upon the purchaser, whether signed by him or not. Neither does the fact that the first company omitted or dispensed with the signing of the ticket affect the right of the second company to insist on the conditions, and it did not make the ticket transferable." Hutch. Carr. § 575; 1 Fetter, Carr. Pass. § 285; *Quimby v. Railroad Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846. There is a distinction between tickets which are mere tokens or checks not purporting to be contracts between the carrier and the purchaser, but which only indicate the route over which the passenger is to be carried, and contract tickets like that in the present case. This difference is noted in *Fonseca v. Steamship Co.*, 153 Mass. 553, 27 N. E. 665, wherein it is held that one who accepts a contract, and proceeds to avail himself of its provisions, is bound by the conditions and stipulations expressed in it, whether he reads them or not. In 4 *Elliott, R. R.*, in a note to section 1593, the following rule is deduced from numerous authorities cited: "We think that a ticket may be both a receipt and a contract, and, in so far as it is a contract, its term should be held binding. Many of the cases above cited hold that a mere notice limiting liability or the like printed on the ticket is not binding because it is not a contract; but, when shown to be part of the contract, if it is such as the law permits, we think it is binding, and there can, we think, be no doubt that such is the case as to terms and stipulations in the contract part of the ticket, especially where it is signed by the purchaser." In the same section the following on the subject is said: "But the terms of the contract, or certain conditions and limitations which enter into and form part of the contract, are frequently written or printed on the face of the ticket, and, where such is the case, we think the better rule is that a passenger has no right to rely on the representations of an agent or conductor which are contrary to its express limitations and conditions." In the case of *Railroad Co. v. Rodebaugh*, 38 Kan. 45, 15 Pac. 899, relied on by counsel for defendant in error, the loss of a passenger's baggage was involved. There was a declaration printed on the ticket as follows: "None of the companies represented in this ticket will assume any liability on baggage except for wearing apparel, and then only for a sum not exceeding \$100." There was a blank space for the purchaser's signature, but it was not filled. It was decided that the above condition was not binding on the passenger. The language used is referred to in the opinion as a declaration of the company. It was merely an assertion on the part of the carrier, a proclamation that it absolved itself from liability for loss exceeding \$100. The case at bar is materially different. Here there was something more than a notice to the passenger that the ticket must be used within the limited time. The words used in the ticket in the present case were indicative of a con-

Case Distinguished.

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tract between the parties regarding the time within which the ticket must be used. 4 Elliott, R. R. § 1593, note. It follows logically, when it is decided that the acceptance and use of such a ticket as that held by the defendant in error constituted a contract between her and the carrier, that its positive terms, being expressed in writing, cannot be contradicted or varied by parol evidence. Nor can oral agreements relating to the subject expressed in the written ticket, made before or at the time it was issued, be received in evidence in contradiction of its stipulations. This is but the application of an old and well-settled rule of evidence. *Rogers v. Perrault*, 41 Kan. 385, 21 Pac. 287; *Willard v. Ostrander*, 46 Kan. 591, 26 Pac. 1017, and cases cited. There is no ambiguity appearing in this contract of carriage, or the use of words having a doubtful meaning. So far as the knowledge of plaintiff below is concerned, it is not pretended that she at any time prior to her alleged injury had any other information regarding her rights as a passenger beyond that derived from the expressed stipulations of the ticket. The attempt, therefore, of the plaintiff below to impeach the written terms of the ticket by the parol testimony of her brother must fail of its purpose, and the testimony held to be inadmissible. Holding this view of the case, it follows that the plaintiff below was not wrongfully put off the train. The judgment of the court of appeals and district court will be reversed, with directions to the latter court to enter judgment on the findings of the jury in favor of the defendants below. All the justices concurring.

## NOTES.

**CARRIERS OF PASSENGERS—VALIDITY OF STIPULATION FIXING TIME FOR EXPIRATION OF TICKET.**

**General Rule.**—A carrier of passengers has the legal right to make reasonable rules and regulations for the conduct of its business in the transportation of passengers. When a regulation is made affixing a limit to the time in which a ticket shall be good, and the time of the limit affords to the passenger ample opportunity to make his journey with safety and convenience to himself, such a regulation, if otherwise reasonable, becomes a part of the contract of carriage.

*District of Columbia.*—*Watkins v. Pennsylvania R. Co.*, 21 D. C. 1.

*Alabama.*—*McGhee v. Drisdale (Ala.)*, 6 Am. & Eng. R. Cas., N. S., 774, 20 So. Rep. 391.

*Georgia.*—*Southern Ry. Co. v. Howard (Ga.)*, 18 Am. & Eng. R. Cas., N. S., 758; *Southern Ry. Co. v. Watson (Ga.)*, 18 Am. & Eng. R. Cas., N. S., 209.

*Indiana.*—*Terre Haute, etc., R. Co. v. Fitzgerald*, 47 Ind. 79.

*Iowa.*—*Trezona v. Chicago S. W. Ry. Co. (Iowa)*, 12 Am. & Eng. R. Cas., N. S., 104.

*Louisiana.*—*Rawitzky v. Louisville & N. Ry. Co.*, 40 La. Ann. 47, 3 South. 387.

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*Maryland*.—McClure v. Philadelphia, etc., R. Co., 34 Md. 532, 6 Am. Rep. 345; Pennington v. Philadelphia, etc., R. Co., 62 Md. 95, 18 Am. & Eng. R. Cas. 310.

*Massachusetts*.—Boston, etc., R. Co. v. Proctor, 1 Allen (Mass.) 267, 79 Am. Dec. 729.

*Michigan*.—Heffron v. Detroit City R. Co., 92 Mich. 406.

*Mississippi*.—Howard v. Chicago, etc., R. Co., 61 Miss. 194, 18 Am. & Eng. R. Cas. 313.

*Missouri*.—Lillis v. St. Louis, etc., R. Co., 64 Mo. 464.

*New Jersey*.—State v. Campbell, 32 N. J. L. 309.

*New York*.—Auerbach v. New York Cent. & H. R. R. Co., 60 How. Prac. 382; Barker v. Coffin, 31 Barb. (N. Y.) 556; Boice v. Hudson River R. Co., 61 Barb. (N. Y.) 611; Elmore v. Sands, 54 N. Y. 512, 13 Am. Rep. 617; Gale v. Delaware, etc., R. Co., 7 Hun (N. Y.) 670; Hill v. Syracuse, B. & N. Y. R. Co., 63 N. Y. 101; Nelson v. Long Island R. Co., 7 Hun (N. Y.) 140; Pier v. Finch, 24 Barb. (N. Y.) 514; Wentz v. Erie R. Co., 3 Hun (N. Y.) 241.

*North Carolina*.—McRea v. Wilmington, etc., R. Co., 88 N. Car. 526, 18 Am. & Eng. R. Cas. 316.

*Ohio*.—Powell v. Pittsburgh, etc., R. Co., 25 Ohio St. 70.

*Texas*.—Texas & P. Ry. Co. v. McDonald, 2 Willson (Tex.), Civ. Cas. Ct. App. § 163.

*Vermont*.—Shedd v. Troy, etc., R. Co., 40 Vt. 88.

*West Virginia*.—Grogan v. Chesapeake & O. Ry. Co., 39 W. Va. 415, 19 S. E. Rep. 563.

*Canada*.—Briggs v. Grand Trunk R. Co., 24 U. C., Q. B. 510; Farewell v. Grand Trunk R. Co., 15 U. C., C. P. 427.

A rule established by a carrier of passengers that tickets over its road should be dated on the day of their sale, and should only entitle each holder to a passage on that day, provided that joint tickets should be good for such further time as might be necessary to enable the holders, by the regular trains of the road, to reach the stations to which such tickets were sold, is reasonable. *Johnson v. Concord R. Corp.*, 46 N. H. 213.

Where a company sells a ticket which entitles the purchaser to ride upon its cars a certain number of times within a given period, for a price below the usual rate of fare, which ticket specifies upon its face that it is only good during such period, the purchaser having failed to ride the specified number of times within the period named is not entitled to ride upon such ticket after the period expires. *Powell v. Pittsburgh, C. & St. L. R. Co.*, 25 Ohio St. 70, 13 Am. Ry. Rep. 477.

**Same—Excursion Ticket.**—The purchaser of an excursion ticket which contains a stipulation that it shall be "good for one passage on the day sold only" cannot lawfully claim a passage under it at any time except on the day designated therein. *State v. Campbell*, 32 N. J. L. 309.

**Only Necessary That Journey Should Be Commenced within Time Limit.**—A ticket entitling the purchaser to a continued passage between two given points, if used within a certain time, is good for such continued passage if the same be commenced within the time limited. *Lundy v. Central Pac. R. Co.*, 18 Am. & Eng. R. Cas. 309, 66 Cal. 191, 4 Pac. Rep. 1193, 56 Am. Rep. 100; *Auerbach v. New York Cent. & H. R.*

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R. Co., 89 N. Y. 281, 42 Am. Rep. 290; *Evans v. St. Louis, I. M. & S. Ry. Co.*, 11 Mo. App. 463; *Louisville & N. R. Co. v. Stephen*, 13 Ky. Law Rep. 687.

**Same—Contract for Carriage over Connecting Lines.**—A joint undertaking, executed by a company for itself and connecting lines, to transport a ticket holder to a designated place within a limited time would also apply to the time within which the journey should be commenced. The ticket holder having commenced the journey within the limit of the ticket, he would be entitled to be carried to his destination, notwithstanding the limit expired while on the continuous journey indicated by the ticket. *Gulf, C. & S. F. R. Co. v. Looney*, 52 Am. & Eng. R. Cas. 197, 85 Tex. 158, 19 S. W. Rep. 1039.

**Contra.**—*Gulf, C. & S. F. Ry. Co. v. Looney*, 85 Tex. 158, 19 S. W. Rep. 1039, 34 Am. St. Rep. 787, 16 L. R. A. 471.

And in *Craig v. Great Western R. Co.*, 24 U. C., Q. B. 509, it was held that the whole journey must be completed before the expiration of the time limited.

**Ticket Good if Presented before Midnight of Last Day.**—A ticket was sold on the sixth day of December, marked to be used "within two days from the date sold." *Held*, that it was good until midnight of December 8, though the evidence showed that it was sold about noon on the 6th. The date of its issue is excluded. *Georgia Southern R. Co. v. Bigelow*, 68 Ga. 219.

Where it is expressed in terms upon a ticket that it is not good unless "used" on or before a certain day, a presentation of the ticket and the acceptance of it by the conductor before midnight of that day, although the journey is not completed until the next morning, will be held to be a compliance with the condition; and where the terms of a ticket bind the passenger to a continuous journey, such requirement is fulfilled if the passenger commences his journey at an intermediate point. *Auerbach v. New York C. & H. R. R. Co.*, 6 Am. & Eng. R. Cas. 334, 89 N. Y. 281; *Evans v. St. Louis, I. M. & S. R. Co.*, 11 Mo. App. 463.

**Merely Reaching Station Not Sufficient.**—It has been held that, in order to entitle the holder of the ticket to ride on it, he must take actual passage on the train, merely reaching the station not being sufficient, if the last train departing on the day of the expiration of the ticket has left. *Arnold v. Pennsylvania R. Co.*, 115 Pa. 135.

**Rule Where Continuous Trip Is Provided for.**—Railroad companies are authorized to make a contract, as evidenced by a ticket sold, which provides that it is to be used within three days, and is good for a continuous trip only; and the passenger must use the ticket according to agreement. *Barker v. Coffin*, 31 Barb. (N. Y.) 556.

A railroad ticket contained a condition that it was "good for a continuous passage on and from the date stamped on the back." *Held*, that it was limited to use upon the day it was dated and such further time as was absolutely necessary to complete the continuous passage. *Texas & N. O. R. Co. v. Powell*, 13 Tex. Civ. App. 212, 35 S. W. Rep. 841.

That the holder of a through ticket for continuous passage entered upon a train which only covered a part of the journey, and was permitted by the conductor to remain, upon the ticket, does not entitle him to have passage for the remaining distance upon the through train,

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the limit of the ticket having expired. *Gulf, C. & S. F. R. Co. v. Henry*, 52 Am. & Eng. R. Cas. 230, 84 Tex. 678, 19 S. W. Rep. 870.

**Ticket for Continuous Passage over Several Roads.**—Where a passenger holds a ticket good over several roads, marked "good for one continuous passage to the point named in the coupon attached," the contract is not with any one company, or jointly by all the companies named, but is a separate contract by each company for a continuous passage over its road; and when it is presented to the last road on the date named when it shall expire and it is accepted, it is not necessary that the passage be completed on that day, and the passenger has a right to go through on the ticket. *Auerbach v. New York C. & H. R. R. Co.*, 89 N. Y. 281, reversing 60 How. Pr. 382.

**Limited Ticket over Connecting Lines—Effect of Delay on Intermediate Line.**—If a railroad company sells a limited ticket over its own line and connecting roads, and such ticket is the joint contract of the several carriers, a passenger who is delayed by the fault of one of the roads is entitled to complete his journey upon such ticket although the time expires before he reaches the last of the connecting lines. But if such ticket expressly provides that the carrier selling it is merely the agent of the connecting roads, and is not responsible beyond its own lines, the passenger is not entitled to be carried over the last road after the time has expired, although he was delayed by the fault of one of the other companies. *Gulf, C. & S. F. R. Co. v. Looney*, 52 Am. & Eng. R. Cas. 197, 85 Tex. 158, 19 S. W. Rep. 1039, 34 Am. St. Rep. 787, 16 L. R. A. 471.

**Effect of Delay Which Would Have Prevented the Taking of an Earlier Train.**—In *Pennsylvania Co. v. Hive*, 41 Ohio St. 276, it was held that where a passenger's ticket was limited to expire on a certain date he was not entitled to ride on a train after that date, though a delay of the company would have prevented him from taking an earlier train.

**Ticket Expiring on Sunday—Failure to Run Trains.**—If a contract matures on Sunday, the performance of it is to be exacted on the next day. So where a passenger holds a limited ticket which expires on Sunday, and he is prevented from riding on that day because the company runs no trains, he is entitled to a passage on the next day. *Little Rock & Ft. S. R. Co. v. Dean*, 21 Am. & Eng. R. Cas. 279, 43 Ark. 529, 51 Am. Rep. 584.

**Ticket "Good for This Trip Only."**—A ticket marked "good for this trip only" is not limited to any particular day or train. The condition relates to the time of using the ticket and not to the journey; and the passenger may use it on the date when it is issued, or on any subsequent date. *Pier v. Finch*, 24 Barb. (N. Y.) 514.

**Effect of Statute Making Ticket Good for a Certain Number of Years.**

—The provision of Me. Act of 1871, ch. 223, which declares that no railroad company shall limit the right of a ticket holder to any given train, but that such ticket holder shall have the right to travel on any train, whether regular or express train, and to stop at any of the stations at which such train stops, and that such ticket shall be good for a passage as above for six years from the day it is first issued, applies to a foreign company doing business in the state, and it must conform to the statute. *Dryden v. Grand Trunk R. Co.*, 60 Me. 512.



## Turley v. Boston &amp; M. R. R

A ticket, bought in another state for a passage thence to a point in Massachusetts, was by a statute of the former state good for six years, and allowed passengers to stop over at will. The passengers stopped at an intermediate point in Massachusetts and received a stop-over check stating on its face that it was good only for ten days. After that limit had expired, and within the six years, he renewed his journey and tendered such check in payment of his fare, but it was refused. *Held*, that the statute only referred to transportation in the other state, and that the company could maintain an action in Massachusetts against the passenger to recover his fare. *Boston & M. R. Co. v. Trafton*, 151 Mass. 229, 23 N. E. Rep. 829.

**Waiver of Condition.**—An indorsement upon an expired limited ticket, by a conductor, showing that it had been used to an intermediate station, before the expiration of the time specified, or an allowed use of it for a portion of the distance thereafter, with an indorsement showing it, is not such a waiver of the condition as allows a further use of the ticket. *Hill v. Syracuse, B. & N. Y. R. Co.*, 63 N. Y. 101.

A passenger bought a ticket good for five days, with stop-over privileges. *Held*, that the provision limiting it to five days was valid and binding, and the fact that a baggageman checked the baggage and punched the ticket after the limitation of the time was not a waiver of the limitation. *Wentz v. Erie R. Co.*, 3 Hun (N. Y.) 241, 5 T. & C. 556.

Where a ticket is issued, marked "good for this day only," the passenger is not entitled to use it on any subsequent day, notwithstanding the agent who sold it said afterwards that it would be good at any time, unless such agent had authority from the company to make an oral contract varying the one evidenced by the ticket. *Boice v. Hudson River R. Co.*, 61 Barb. (N. Y.) 611; *McClure v. R. W. & B. R. R. Co.*, 34 Md. 532.

**Stop-Over Privileges—Agreement with Agent.**—See *International & G. N. R. Co. v. Best* (Tex.), 17 Am. & Eng. R. Cas., N. S., 153, and *note*, 157 *et seq.*

## TURLEY

v.

BOSTON &amp; M. R. R.

*(Supreme Court of New Hampshire, Hillsboro, July 27, 1900.)*

[47 Atl. 261.]

**Master and Servant—Injury to Third Person by Servant—Scope of Employment.**\*—Plaintiff testified that he went to defendant's freight yard to look for coal cars, intending to apply for a job of shoveling, and was shot by defendant's servant while running away after the latter had attempted to seize him as a trespasser; but there was no evidence that the shooting resulted from defendant's fault, or was directed by it

\*See notes at end of case.

Turley v. Boston & M. R. R

or done by its authority, or that the act complained of was any part of the work of the servant, who was employed to clean and care for the lamps in the yard, and which was the sole capacity in which he represented defendant. *Held*, that defendant was not liable for the injury, since the servant's act, whether willful or negligent, was not within the scope of his employment.

Exceptions from Hillsboro county.

Action by Hugh Turley against the Boston & Maine Railroad. A nonsuit was ordered, and plaintiff excepted. Exceptions overruled.

Case for injuries received by being shot while in the defendants' freight yard in Manchester by Thomas J. Saxton, an employee of the defendants. The plaintiff testified that he went to the freight yard on January 15, 1899, as he had done frequently, to see if there were cars of coal consigned to local dealers, so that he might apply for a job of shoveling. While in the yard he heard shouting, and saw men running. Saxton walked up to him, seized him, asked him where he was going, and started to draw a black-jack, whereupon the plaintiff broke away and ran about 100 feet, when he was shot in the back. He made no assault upon Saxton. Saxton testified that: He was employed by the defendants to clean and care for the lamps in the freight yard. Prior to the day of the shooting, he had driven from the yard certain persons, denominated the "Scut Beer Gang," whose habit it was to loiter there, and who had fought with him and made threats against him. He reported these affrays to the defendants' agent, and was told to look out for himself. On January 15, 1899, Saxton saw members of the beer gang (the plaintiff being one of the party) going towards the freight yard. He followed them, and found the plaintiff on the watch. After an unsuccessful attempt to seize the plaintiff, Saxton ran down the yard, and, seeing others gathering, apparently to make a fight, fired a revolver at the end of a freight car for the purpose of frightening the crowd and protecting himself. He did not think the bullet could have hit the plaintiff. Saxton was not an officer or a watchman. He had no orders to drive the beer gang from the freight yard, and was required only to report their presence there; but, whenever he saw them going to the yard, it was his practice to follow them and order them off the defendants' premises. At the close of the plaintiff's evidence a nonsuit was ordered, subject to his exception.

Sullivan & Broderick, for plaintiff. Oliver E. Branch and Cyrus H. Little, for defendants.

Parsons, J. As there was no evidence tending to show that the shooting of the plaintiff by Saxton resulted from any fault of the defendants, was directed by them or done by their authority, or was any part of Saxton's work of cleaning and

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caring for the lamps in the yard, for which he was employed, and which was the sole capacity in which he represented the defendants, it cannot be found that the act of Saxton complained of, whether willful or negligent, was the defendants' act, or within the scope of Saxton's employment by them. *McGill v. Granite Co.* (N. H.) 46 Atl. 684; *Rowell v. Railroad Co.*, 68 N. H. 358, 44 Atl. 488; *Andrews v. Green*, 62 N. H. 436; *Wilson v. Peverly*, 2 N. H. 548. Exceptions overruled. Judgment for the defendants.

Peaslee, J., did not sit. The others concurred.

## NOTES.

**LIABILITY OF RAILROAD COMPANIES FOR ASSAULTS BY EMPLOYEES.**

**Liability of Master for Torts of Servant Committed Outside Scope of Employment.**—See generally, *note*, 14 Am. & Eng. R. Cas., N. S., 562 *et seq.*

**Liability of Railroad Company for Assaults by Employees Not Acting within Scope of Employment.**—See generally, *note*, 14 Am. & Eng. R. Cas., N. S., 563.

**Liability for Injuries to Passengers from Malicious Acts of Employees.**—See extensive *note*, 12 Am. & Eng. R. Cas., N. S., 266 *et seq.*

**Liability of Carrier for Assault on Passenger by Servant Not in Line of Duty.**—See *Haver v. Central R. Co.* (N. J.), 12 Am. & Eng. R. Cas., N. S., 261, and *notes*, 666 *et seq.*

**Sleeping-Car Companies**—**Liability for Assaults by Porter on Passenger.**—A porter in the employ of a sleeping-car company whose duty it was to attend the calls of the passengers and serve them food when requested, answered a summons by a passenger for his attendance, and upon the passenger requesting him to procure food he became enraged and, without provocation, attacked the passenger, brutally assaulting him. *Held*, that under the laws of Illinois the porter was engaged in the company's business and was acting within the scope of his employment, and that the company was liable to such passenger for punitive damages. *Pullman Palace-Car Co. v. Lawrence* (Miss.), 8 Am. & Eng. R. Cas., N. S., 59. And see *note* at end of case, p. 79.

**Assault on Conductor by Passenger**—**Lawful Force in Repelling Assault.**—A conductor cannot lawfully use more force in repelling an assault upon him by a passenger than is necessary for his defense. *St. Louis S. W. Ry. Co. v. Berger*, 10 Am. & Eng. R. Cas., N. S., 235, and see *note*, *Id.* 249 *et seq.*

**Assault on Passenger by Conductor Resenting Insult.**—Where a passenger on arriving at the place to which he had paid his fare on a railroad train missed his watch, and supposing it to have been stolen, refused to leave the train until he should recover his watch, and the conductor consented that he might remain on the train until it reached another station, and after the train had started and a partial search had been made, a passenger asked who he thought had his watch, when he replied, "That fellow," pointing to a brakeman, who immediately struck him in the

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face with a lantern. *Held*, that the facts showed a right of action against the railroad company for the injury inflicted by its servant, and that the company occupied the same position towards the passenger as if he had paid his fare to such other station. *Chicago & Eastern R. Co. v. Flexman*, 103 Ill. 546, 8 Am. & Eng. R. Cas. 354.

**Liability of Railroad Company for Act of Conductor in Shooting Person Who Had Broken into Car.**—In *Candiff v. Louisville, N. O. & T. R. Co.*, La. Sup. Ct., April 21, 1890, it was held that if it be true, as stated by plaintiff's witness, that defendant's conductor, on discovering that a car had been broken open, believing that it had been done by a certain person, coolly walked up to such person, as he was standing quietly at a station, saying and doing nothing, and shot him down without a word, such an act would be a murder, entirely beyond the scope of any employment or function of the conductor, for which the company could not be held responsible. If, on the other hand, the conductor's statement be true, that the person shot was detected in having broken open one of the cars in the nighttime, and when discovered jumped out and ran, and refused to stop when halted, and was thereupon fired at and shot by an employee of the train, in such a case the criminal's joint and contributory fault would bar his recovery in a civil action for damages.

**Assault by Station Agent on Person at Depot to Receive Freight.**—Where it appeared that plaintiff was authorized to receive freight for certain parties, and in pursuance thereof went to the depot of defendant and demanded the same of the agent who was in charge of the depot and was authorized to receive and deliver freight, and while so demanding it the said agent made an assault upon him, and it did not appear that said assault was made in ejecting or attempting to eject plaintiff from the depot, or in preventing or attempting to prevent him from committing any injury to the property of the defendant, or from transgressing any rules for the regulation of its depot and the transaction of its business, *held*, that the company was not liable for the assault, and that only the agent who actually made it was liable. *Hudson v. Missouri, K. & T. R. Co.*, 16 Kan. 470.

**Homicide by Station Agent.**—A railroad company is liable in damages for the wrongful homicide of its customer committed by its depot agent in his office while the customer was lawfully there for the transaction of business with such agent appertaining to his agency. This results from the Code, § 3033, which renders all railroad companies liable for damages done by any person in their employment and service unless their agents have exercised all ordinary care and diligence. *Christian v. Columbus & Rome R. Co.*, 79 Ga. 460, 38 Am. & Eng. R. Cas. 261.

**Homicide by Insane Station Agent.**—A railroad company is not liable for a homicide committed by its insane station agent, unless the latter was employed with knowledge of insanity. *Christian v. Columbus, etc.*, R. Co., 79 Ga. 460, 38 Am. & Eng. R. Cas. 261.

**Assault at Station by Police Officer in Employ of Railroad Company.**—A railroad company is liable to a person who being aroused from a sleep in a station leaves the same, and on returning is struck by a billy in the hands of a police officer in the employ of the company. *Texas & P. Ry. Co. v. Bowlin (Tex.)*, 32 S. W. Rep. 918.

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**Company's Physician Assaulting Assistant.**—In *Campbell v. Northern Pac. R. Co.* (Minn.), 53 N. W. Rep. 768, it was held that where a physician and surgeon employed by a railway company to attend to sick and injured persons committed to his charge is alleged to have wilfully and maliciously assaulted an assistant, it is presumptively an independent tort, for which the master is not liable, and a bare statement or allegation that it was done in the course of his employment, and while in the discharge of his duty, is insufficient by itself to charge the master with liability. The court said: "The case is quite different from that of an assault upon a patient in charge of the defendants, and to whom they owed the duty alleged, in which case the rule stated in *McCord v. Telegraph Co.*, 39 Minn. 184, 25 Am. & Eng. Corp. Cas. 578, would apply: An assault upon a patient to whom the defendants owed a special duty, and alleged to have been done in the course of the employment, would present an entirely different case. But it does not appear that there was a breach of any duty owed by defendant corporation to the plaintiff which their steward, McGregor, violated in the acts alleged, or that the wrong complained of was expressly or impliedly authorized by the railway company, or how it could be committed in the course of McGregor's employment, or in furtherance of the master's business."

**Attack with Deadly Weapons—Seizure of Railroad of Another Company—Personal Injuries.**—The *Atchison, Topeka & Santa Fe R. Co.* was in peaceable possession of a railroad from Alamosa to Pueblo, and while so in possession the *Denver & Rio Grande R. Co.*, by an armed force of several hundred men, acting as its agents and employees, and under its vice-president and assistant general manager, attacked with deadly weapons the agents and employees of the *Atchison, Topeka & Santa Fe R. Co.* having charge of the railroad, and forcibly drove them from the same, and took forcible possession thereof. There was a demonstration of armed men all along the line of the railroad seized, and while this was being done, and the seizure was being made, the plaintiff, an employee of the *Atchison, Topeka, & Santa Fe R. Co.*, while on the track of the road, in the line of his employment, was fired upon by men as he was passing, and seriously wounded and injured. Immediately upon the seizure of the railroad as aforesaid, the *Denver & Rio Grande Co.* accepted it, and entered into possession and commenced and for a time continued to use and operate it as its own. The plaintiff brought this suit to recover damages for his injuries. *Held*, that the *Denver & Rio Grande Co.* was liable in tort for the acts of its agents, and that the plaintiff could recover damages for the injuries received, and punitive damages under the circumstances. *Denver & Rio Grande R. Co. v. Harris*, 122 U. S. 397, 31 Am. & Eng. R. Cas. 593.

**Assault on Fellow Servant.**—Where a railroad employee on a hand car strikes at another employee because of a personal matter between the two, and thereby causes another co-employee to fall from the car and sustain injuries, there can be no recovery against the common employer, as the tortious act was not one within the scope of employment. *Kincaid v. Chicago, M. & St. P. Ry. Co.* (Iowa), 14 Am. & Eng. R. Cas., N. S., 559.

**Abduction of Boy by Conductor.**—"It is common knowledge," that if the conductor of a passenger train stops his train, pursues a boy on foot

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into his father's house, with a pistol in his hand, seizes the boy, and carries him off on the train, these wrongful acts are not within the range of his employment; consequently, the railroad company is not liable in damages for such wrongful acts, without averment and proof that it commanded, authorized, or ratified them. *Gilliam v. South and North Alabama R. Co.*, 70 Ala. 268, 15 Am. & Eng. R. Cas. 138.

**Boy Assaulted by Driver of Street Car.**—A street-railroad company was held not liable for the act of a driver in willfully knocking a small lad from the platform while the car was in motion, but was held liable for the negligent act of the same employee in driving over him. *Pittsburg, A. & M. Pass. R. Co. v. Donahue*, 76 Pa. St. 119.

**Assault by Motorman on Driver of Obstructing Wagon.**—In an action against a street-railway company to recover for an assault and battery committed on the plaintiff by a motorman in the employ of the defendant, it appeared that the motorman, without orders from the conductor or any officer of the defendant had left his car and assaulted the plaintiff because his wagon was obstructing the defendant's track. *Held*, that the motorman was not acting within the scope of his employment and that a nonsuit was properly granted. *Rudgeair v. Reading Traction Co. (Penn.)*, 8 Am. & Eng. R. Cas., N. S., 112.

**Assault upon Person Having No Connection with the Railroad Company.**—A railroad company is not liable for an assault committed by its employees, who are engaged in running a train, upon a person who is not a passenger, nor in any way connected with the road. *Porter v. Chicago, R. I. & P. R. Co.*, 41 Iowa 358; *Allen v. London & S. W. R. Co., L. R.*, 6 Q. B. 65; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110; *Thames Steamboat Co. v. Housatonic R. Co.*, 24 Conn. 40, 54; *Elkins v. Boston & M. R. Co.*, 23 N. H. 275; *Pennsylvania R. Co. v. Zug*, 47 Pa. St. 480; *DeCamp v. Mississippi & M. R. Co.*, 12 Iowa 348; *Cooke v. Illinois C. R. Co.*, 30 Iowa 202.

Where a servant goes outside of his employment, and while so acting in pursuance of the authority given him inflicts a willful injury upon one not entrusted to his care by the master, or on one to whom the master owes no duty, the act will be that of the servant alone, and the master cannot be held liable for it. *Chicago & Eastern R. Co. v. Flexman*, 103 Ill. 546, 8 Am. & Eng. R. Cas. 354.

**Liability for Forcible Ejection of Trespasser from Train.**—See *Dorsey v. Kansas City, P. & G. Ry. Co. (La.)*, 20 Am. & Eng. R. Cas., N. S., 67, and *foot-note*.

**Violent Ejection of Trespasser from Moving Train after Being Repeatedly Ordered Off—Verdict Directed for Defendant.**—Plaintiff, according to his testimony, after having been properly ordered from defendant's train several times by a brakeman, attempted to board another car in order to steal a ride, and was discovered by the same brakeman, who compelled him by personal violence to drop from the car ladder to the ground while the train was moving rapidly, and possibly at a speed of from 15 to 20 miles an hour; and plaintiff was severely injured by the fall. *Held*, that the railroad was entitled, at the close of plaintiff's testimony, to have a verdict directed in its favor. *Johnson v. Chicago, St. P., M. & O. Ry. Co. (C. C.)*, 15 Am. & Eng. R. Cas., N. S., 683.

**Kicking Trespasser Off Moving Engine.**—While the engine of a

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railroad company was standing still upon a siding, A., with the knowledge of and without any objection by the company's servants, mounted upon the same and seated himself on the front part thereof under the head-light. Shortly after the servants of the railroad company put the engine in motion, and while the same was running at a rate of speed which rendered it unsafe for A. to get off, called to him to do so. He replied that he would if the engine was stopped. The servants of the company declined, however, to stop the engine, and one of them kicked A. off in such a manner that the engine passed over him crushing his leg. A. having brought an action against the railroad company to recover damages for the injury done him, *held*, that although plaintiff had been negligent in getting upon the engine, that negligence could not be deemed an efficient cause of his injury and that therefore it did not preclude him from recovering. *Held*, further, that the act of the company's servant in turning A. off of the engine was within the scope of said servant's employment and that the company must respond in damages accordingly. *Carter v. Louisville, etc., Ry. Co. (Ind.)*, 8 Am. & Eng. R. Cas. 347.

**Liability for Assault upon Trespasser after Ejection from Train—Continuous Transaction.**—Where the acts of a brakeman in frightening a trespasser from a car of a work train by violence, and in seizing and pushing him under the car, so that his feet are crushed by its wheels, all occur within a few seconds, such acts constitute one transaction, for which the railroad company is liable, the ejection of the trespasser being one of the brakeman's duties. *Elliot v. Louisville & N. R. Co. (Ky.)*, 15 Am. & Eng. R. Cas., N. S., 805.

**Liability of Railroad Company for Illegal Arrests Made by Employees.**—See *Penny v. New York, etc., R. Co. (N. Y.)*, 12 Am. & Eng. R. Cas., N. S., 180, and *notes*, 183 *et seq.*

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v.

LOUISVILLE & N. R. Co. *et al.**(Supreme Court of Tennessee, Jan. 12, 1901.)*

[61 S. W. 57.]

**Bills of Lading—Consignment—Removal—Demurrage—Lien.\***—Plaintiff received three cars of stone over defendant's road. Due notice of its arrival was given plaintiff, together with the amount of the freight charges thereon, but plaintiff did not pay the same until 10 days after the arrival of the cars, when defendant refused to deliver the stone until demurrage charges had been paid. Plaintiff had a stone yard to which a side track had been constructed by a company other than defendant, though cars could be transferred from defendant's track to this side

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\*See notes at end of case.

track. The bill of lading under which the stone was shipped provided that the delivering carrier might make a reasonable charge every day for the detention of any car and for the use of the track after the car had been held 24 hours for unloading, and might add such charges to all other charges hereunder, and hold such property subject to lien therefor, and that the consignee should pay all charges before a delivery of the property. *Held*, in conversion for the value of the stone, that the defendant was entitled to the payment of the demurrage, under the bill of lading, before a delivery of the property, and hence it was not necessary for the defendant to place the cars on plaintiff's side track before making a demand therefor, as such would constitute a delivery of the property.

**Same—Demurrage—Reasonableness of Stipulation.**—A stipulation in a bill of lading that the carrier may make a reasonable charge for a failure of the consignee to unload his property from the carrier's cars within 24 hours after its arrival is a reasonable provision, and hence it was not error for the trial court to charge that the parties were bound thereby.

Appeal from circuit court, Davidson county; John W. Childress, Judge.

Action by Peter Swan against the Louisville & Nashville Railroad Company and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Washington & Allen, for appellant.

Smith & Madden, for appellees.

Wilkes, J. This is an action for the value of some stone, and the freight paid on the same, upon the theory that the stone was shipped to plaintiff over the defendant road, but was converted by the road, and plaintiff deprived of the same. The suit was brought before a justice of the peace. The defense was, in effect, the same as under a plea of general issue. Upon trial before the court and jury, there was verdict and judgment for defendants, and plaintiff has appealed to this court, and assigned errors.

The facts, so far as necessary to be stated, are that three cars of stone were shipped to the plaintiff, P. Swan, from the Bedford, Ind., quarries. Mr. Swan was notified of the arrival of the cars of stone, and that, upon payment of the freight, the cars would be placed on the track leading to his yard, where he had a derrick and other machinery for unloading. This track was constructed jointly by Swan and the Nashville & Chattanooga Railroad Company, and the Louisville & Nashville Railroad Company had no interest in it or control of it. The plaintiff, Swan, was further notified that charges for car service would begin to run after two days, unless the freight was paid. Several other notices to the same effect were given him on successive days, but he failed to pay the freight until



about ten days after the arrival of the first car, and seven days after the arrival of the last. He then sent a check to the company to pay the freight, but did not pay, and refused to pay, any car-service charges. He was informed that there was a demurrage,—a car-service charge of \$21 upon the cars,—and that this must be paid before the cars would be placed upon his track for unloading. He refused to pay anything on this account, and this suit is to recover for the value of the stone as upon a conversion. The Louisville & Nashville Railroad Company moved the stone out of their yards after suit was brought, and unloaded it on its right of way, in East Nashville, where its till remains, about two miles distant from the yards of the plaintiff.

Without passing specifically upon the errors assigned, it is only necessary to say that the real question presented in the case, and raised by the assignments, is, did the railroad have the right to demand the pre-payment of the freight before placing these cars of stone upon the plaintiff's yard track, and did it have the right to demand demurrage for failure to pay the freight; and, after the freight had been paid, did it have the right to retain the cars of stone in its possession and under its control unless and until the demurrage which had at that time attached was paid? The bill of lading under which this stone was shipped contained several clauses bearing upon the matter in controversy. Paragraph 5 is in these words: "Property not removed by the persons or party entitled to receive it, within 24 hours after its arrival at destination, may be kept in the car depot or place of delivery of the carrier at the sole risk of the owner of such property, or may, at the option of the carrier, be removed or otherwise stored at the owner's risk and cost, and they are subject to lien for freight and all other charges. The delivering carrier may make a reasonable charge every day for the detention of any car, and for the use of the track after the car has been held 24 hours for unloading, and may add such charges to all other charges hereunder, and hold said property subject to lien therefor." Paragraph 10 reads as follows: "The owner or consignee shall pay the freight at the rate hereon stated, and all other charges accruing on said property, before delivery, and according to the weights as ascertained by any carrier herein." The contention of plaintiff is that the road has no right to make any demurrage charge, and that, in any event, its right to do so will not accrue until the cars are placed upon plaintiff's track, at the customary place of unloading, which was the inclosed premises of the plaintiff, and reached by the tracks of the Nashville & Chattanooga Railroad, and not by those of the defendant. It appears that at this time the credit of the plaintiff was not considered good by the defendant, and for this reason the stone would not have been delivered upon his premises, where it might be unloaded by the plaintiff. The proof shows that the defendant company was ready to

deliver the cars as plaintiff desired, provided its charges for freight and demurrage were paid. The cars were placed near by the premises of plaintiff, but on those of defendant, but were ready and conveniently placed to be delivered when the charges should be paid.

The court charged that, when the company received this stone for transportation, it did so upon the terms and stipulations of the bill of lading; that it was incumbent upon it to transfer it to its yards in Nashville, at a place convenient for delivery to the plaintiff, at the point he desired to receive it, and that it was not incumbent upon defendant to place it on plaintiff's side track and on his premises until all proper charges were paid; that due notice of arrival should be given; and that the rights of the parties would be governed by the terms of the bill of lading. This charge is objected to, and special requests were made, the ground or basis of all of which is that it was incumbent on the defendant road to place the car upon the side track running into plaintiff's yard at the usual place of delivery and unloading, and until it did so it could claim neither freight nor demurrage. This is practically all that is involved in the case.

We are of opinion the circuit judge was correct, and that the assignments of error are not well made. The defendant company could not be required to part with the possession and control of the property until its legitimate charges were paid, and to have placed it on the plaintiff's premises, where he could unload it as he saw proper and when he pleased, was virtually to part with possession, and to surrender its lien for freight and other charges. The lien existed for demurrage in the case by the express terms of the bill of lading. It was held in the case of *Railroad Co. v. Hunt*, 15 Lea, 261, that, in the absence of contract, a railroad could not claim a lien for demurrage charges, so that the *Hunt Case* is not applicable, and the only question that could arise is whether such a stipulation in a contract is a reasonable one, such as the courts will enforce. A mere statement of the proposition carries with it an answer. If a road cannot make a reasonable charge for detention of its cars by consignee, it is evident that such consignees may delay unloading until virtually the entire rolling stock of the road may be tied up, and its tracks obstructed by loaded cars, awaiting the pleasure or convenience of consignees. We can see no reason why carriers should not be entitled to reasonable compensation for the unreasonable delay and detention of their cars by consignees (4 Elliott, R. R. § 1567; *Miller v. Railroad Co.* [Ga.] 15 S. E. 316, 18 L. R. A. 323); nor to a lien for such charges, when such lien is agreed to, and stipulated for, in the bill of lading. There is no complaint that the amount of charges is unreasonable. We see no error in the judgment of the court below, and it is affirmed, with costs.

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**RIGHT OF CARRIER TO CHARGE DEMURRAGE FOR DETENTION OF CARS BY SHIPPER.**

There are few decisions on this subject, and these do not seem to harmonize.

**Absence of Stipulation in Contract—Authorities Holding That Demurrage May Be Charged.**—The case of *Miller v. Mansfield*, 112 Mass. 260, is an authority supporting the right of a railroad company to make such charges, and also to assert a lien upon goods for the charges. In this case it appeared that a railroad company had a regulation and usage by which cars containing certain kinds of goods should be unloaded by the consignee within twenty-four hours after notice to him of their arrival; and for delay in unloading after that time the corporation charged two dollars a day for each car that contained such freight and was owned by another railroad company. The court *held*, that for a delay in unloading, the corporation, in its capacity as a warehouseman, as against the consignee who had knowledge of these facts, had a lien upon the goods for storage.

In the case of *Union Pacific, Denver & Gulf R. Co. v. Cooke*, in the District Court of Arapahoe County, Colorado (unreported) decided in April, 1892 by JUDGE RISING, the question was squarely presented, whether a railroad company could recover in an action at law, its charges for the detention of cars by the consignee of freight. In a very able opinion JUDGE RISING examines the authorities herein referred to, and reaches the conclusion that the question of demurrage is applicable to land as well as to maritime carriage, and that a railroad company is entitled to make regulations regarding the detention of its cars and to impose penalties therefor, and may recover from consignees of freight who have notice of such regulations, reasonable demurrage charges.

Perhaps this question is most thoroughly considered in a case decided by the Louisville (Ky.) Law and Equity Court, Dec. 20, 1891, *Kentucky Wagon Manufacturing Co. v. Louisville & Nashville R. Co.* (unreported). The opinion of the court was delivered by JUDGE TONEY, and is exhaustive of the subject. The case arose in this manner. The plaintiff (a manufacturing corporation) had a contract with some of the eleven corporations defendant to deliver loaded cars consigned to plaintiff on its (plaintiff's) side tracks, and to remove them, when unloaded, without charge. Plaintiff was dilatory in unloading the cars, and often refused to receive loaded cars on its side tracks within a reasonable time after notice of their arrival. The evidence showed great abuse in this respect both on the part of plaintiff and of other consignees similarly situated. To remedy this the defendant railroad companies whose lines extended into Louisville formed themselves into what is known as the Louisville Car Service Association, and adopted certain rules and regulations to govern their dealings with shippers and consignees with reference to delivery and return of cars. Thereupon quite a number of shippers and consignees in Louisville organized a counter association to resist the enforcement of the rules of the Car Service Association. The plaintiff, a member of this latter organization, refused to comply with said Car Service rules and regulations. The defendant companies, on account of said refusal on their part, refused to deliver their freight cars loaded with freight consigned to plaintiff upon its said private side tracks.

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Thereupon plaintiff filed its bill in equity against the eleven co-defendant railroad companies to restrain them and each of them from refusing to deliver to plaintiff upon its private side tracks, certain designated loaded cars ready for delivery to plaintiff but withheld by defendants, and also from withholding in future, deliveries of freight cars loaded with freight consigned to plaintiff, on account of any non-compliance on its part with the rules of the said Louisville Car Service Association, on the ground as alleged by plaintiff that said rules are unreasonable, oppressive, excessive, contrary to public policy and illegal. One of the association's rules, and the one especially impeached by plaintiff, imposed a charge of one dollar per day or fraction thereof for the delay of cars not unloaded within forty-eight hours after arrival and delivery to consignees, not including Sundays and holidays. Another rule provided that in cases where consignees or consignors should refuse to pay, or should unnecessarily defer the settlement of bills for said car service charges under such rules, the agents of all of said railroad lines should decline to switch cars for such parties until such bills were paid. The plaintiff urged six grounds of impeachment of said rules to prove that they are unreasonable, and therefore not binding on it, to wit: (1) That the period of forty-eight hours, which, computed under the car service rules, extends to near sixty hours, within which it is required to unload said cars after delivery is too short. (2) That the demurrage charge of a dollar per day per car for the detention of cars after the expiration of said forty-eight hours is exorbitant and excessive. (3) That neither the plaintiff nor any other shipper or consignee was consulted by the defendants in the framing of said rules, and that neither it nor any other shipper or consignee has any voice in the selection and appointment of the manager or committee of the Car Service Association. (4) That there is no reciprocity of indemnity and counter-penalty in said rules in favor of plaintiff and other shippers and consignees against the defendants for not promptly performing their duties as common carriers. (5) That the defendants by entering into the Car Service Association have surrendered their corporate autonomy and functions, and relegated the control and management of their business as common carriers to the arbitrary control of the manager and committee of the Car Service Association, and have hereby agreed to abolish competition, and that for this reason the said rules are illegal. (6) That under the car service rules a delivering railroad company is authorized to demand demurrage charges on cars that do not belong to it but to other companies. The court said:

"Without the right of making and enforcing reasonable rules and regulations as to the delivery of freight and the detention of their cars by consignees, railroads would be at the mercy of individual shippers. In order to fulfill the chief end of their creation, *viz.*, the service of the public as common carriers, they should be left free to establish general and reasonable rules and regulations, governing the delivery of freight and charges for the unnecessary or unreasonable detention of their cars by consignees. It is a matter of the highest public interest that they should be accorded this right and power. Individual convenience should be subordinate to the public good which demands expedition, regularity, uniformity, safety and facility in the movement of the freight of the country, which must of necessity be materially obstructed if indi-

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vidual consignees are allowed, without let or hindrance, to convert freight cars on their arrival with cargoes of freight, upon their side tracks, into warehouses for the storage of freight at the suggestion of their convenience or interest. As we have seen railroads are a public necessity, the general welfare of the country being dependent upon their untrammelled inter-connection and untrammelled liberty to accomplish the legitimate public purposes of their organization. Promptness, regularity and safety in the transportation of passengers and freight are essential requisites to the successful administrations of the railroad common carriers systems of the country. These characteristics or qualities, are demanded by the public interest. Regularity and system in the movement of their cars, in the handling of freight, both in receiving, transporting and delivering it, so that the public can know what to expect and what it can depend upon, are demanded of railroads by law and by public policy. But how can this be expected of railroads, if their rolling stock may be tied up and water-logged upon the private side tracks and switches of private consignees to serve as store-rooms and warehouses for their freight, without any power on the part of the railroad companies to enforce reasonable rules against such consignees, requiring diligence in the unloading and re-delivery of their cars? These public carriers rely upon their rolling stock to meet the demands of the volume of business which they have to carry. How can they insure to consignees and shippers in general and to the public that facility of commercial interchange which they are required to afford both by charters and by public law? How can they furnish cars and transportation to shippers in general and discharge the volume of traffic business of their respective systems if their rolling stock can be locked up in the private yards of special consignees? How can such carriers know with any reasonable degree of certainty whether their rolling stock at any given time is, or will be fully up to the demands of the business along their lines? Promptness, uniformity and safety in the railroad traffic business of the country can only be secured by the adoption and strict enforcement by railroad companies of uniform and reasonable rules and regulations, which shall be binding upon all shippers and consignees alike with reference to the reception, transportation and delivery of freight."

In the absence of statutory prohibition it is competent for a common carrier whose customers, at their option, have the privilege of unloading for themselves the vehicles in which their freights are shipped, to adopt and enforce a reasonable regulation as to the time within which the vehicles may be unloaded free of any expense for storage, and to fix a reasonable rate per day at which storage will thereafter be charged for the use of such vehicles so long as they remain unloaded. *Miller v. Georgia Railroad & Banking Co.*, 88 Ga. 563, 15 S. E. Rep. 316, 18 L. R. A. 323, 50 Am. & Eng. R. Cas. 79, 30 Am. St. Rep. 170; *Kentucky Wagon Mfg. Co. v. Ohio, etc.*, R. Co., 98 Ky. 152, 2 Am. & Eng. R. Cas., N. S., 722, 32 S. W. Rep. 595; *Miller v. Mansfield*, 112 Mass. 260; *Crommelin v. New York, etc.*, R. Co., 1 Abb. App. Dec. (N. Y.) 472, 4 Keyes (N. Y.) 90, 10 Boaw. (N. Y.) 77; *Baltimore & O. R. Co. v. Fisher* (Com. Pl.), 3 Ohio N. P. 122; *Baumbeuck v. Gulf, C. & S. F. Ry. Co.*, 4 Tex. Civ. App. 650, 23 S. W. Rep. 693; *Norfolk, etc.*, R. Co. *v. Adams*, 90 Va. 393,

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44 Am. St. Rep. 916, 22 L. R. A. 530; *Kansas Pac. Ry. Co. v. McCann*, 2 Wyo. 3.

In *Norfolk & Western R. R. Co. v. Adams*, 90 Va. 393, 22 L. R. A. 530, 44 Am. St. Rep. 916, it was held that a railroad company is entitled to charge reasonably for delay in unloading cars, and that such a charge is not one for transportation storage or delivery of freight within the statutory prohibition against making any other charge than one provided for by law. In this case FAUNTLEROY, J., in delivering the opinion, said: "That this rule is reasonable and proper and that the railroad company can make such a charge has been decided in a number of states—the question never having arisen before in this state. See *Miller & others v. Georgia Railroad & Banking Company*, reported in *American & English Railroad Cases*, vol. 50, p. 70; *Miller v. Mansfield*, 112 Mass. 260; *Union Pacific, Denver & Gulf Railroad Company v. Cook*, *American & English R. R. Cases*, vol. 50, p. 89; *Kentucky Wagon Manufacturing Company v. Louisville & Nashville Railroad Company*, *Amer. & English Railroad Cases*, vol. 50, p. 90; *C. M. & St. Paul Railway Company v. Pioneer Fuel Company*; *Beach Railway Law*, sec. 924, and cases there cited; *Jones on Liens*, sec. 284, and cases cited; *Lawson's Rights & Remedies*, vol. 4, p. 3146, secs. 1831 and 1832; *Wood's Railway Laws*, pp. 1592-3 and 1600; *Waterman on the Law of Corporations*, vol. 2, pp. 245-6; *Amer. & English Enc. Law*, vol. 2, pp. 878 to 881, and notes; *Redfield on the Law of Railways*, 6th edition, pp. 67 to 83."

A consignee neglecting, after notice, to remove his goods from the cars may be charged demurrage. *Kansas Pac. Ry. Co. v. McCann*, 2 Wyo. 3.

A consignee refusing to receive goods, because of the carrier's delay in delivering cannot be held liable for demurrage fixed by a rule of the carrier, if he was in ignorance of the rule, unless it is shown that the charge is reasonable. *Baumbach v. Gulf, C. & S. F. Ry. Co.*, 4 Tex. Civ. App. 650, 23 S. W. Rep. 693.

In *Huntley v. Dows*, 55 Barb. (N. Y.) 310, it was held that a consignee was liable for the damages occasioned by the unreasonable detention of the goods in the cars, where he failed to unload them while trying to effect their sale.

**Same—Notice to Consignee.**—In *Baltimore & O. R. Co. v. Fisher* (Com. Pl.), 36 Ohio N. P. 122, it was held essential that it be shown that consignee should have had notice of the regulation.

**Sufficiency of Notice of Arrival of Cars to Fix Liability of Shipper for Demurrage.**—Where a party makes a consignment to himself at a point on a connecting line, and the consignment is, during transportation, transferred from the cars in which it was originally shipped to cars of the connecting line, on its arrival at its destination, a notice given by the carrier to the consignee of the fact of the arrival of the number of cars containing the shipment, together with the rolling-stock numbers on the cars, is sufficient notice to render the consignee liable for demurrage for a failure to unload the cars within a proper time after their arrival. It is not necessary to inform the consignee in what cars the shipment was originally made, or into what cars it had been transferred during transportation. *Galveston, H. & S. A. Ry. Co. v. Hunt* (Tex. Civ. App.), 2 Am. & Eng. R. Cas., N. S., 731.

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**Liability of Shipper for Charges for Use of Car While Awaiting Sale of Contents.**—A shipper who knows that a person to whom he expected to sell a carload of corn could not pay for it, and that he himself was expected to pay for the use of the car while the corn was in it, and who allows the corn there to remain until he sells it to another person, is liable for a charge for the use of the car of which he had notice, while awaiting a sale. *Hunt v. Missouri, K. & T. R. Co. (Tex.)*, 31 S. W. Rep. 523.

**Right of One Company to Collect Demurrage for Cars Belonging to Another Company.**—One railroad company may collect a charge for the detention by a shipper or consignee of a car belonging to another railroad company, where, by regulation or universal custom, the company into whose custody the car is delivered is entitled to the earnings of such car as long as it is in its possession. *Kentucky W. Mfg. Co. v. Ohio & M. Ry. Co.*, 98 Ky. 152, 2 Am. & Eng. R. Cas., N. S., 722, 32 S. W. Rep. 595.

**Authorities Cited against the Right to Impose Demurrage Charges.**—The Illinois case is that of *Chicago & N. W. R. Co. v. Jenkins*, 103 Ill. 588, 9 Am. & Eng. R. Cas. 113. Other points seem to occupy the greater share of the attention of the court, and the right of a railroad company to make demurrage charges for the retention of cars is dismissed with these words: "The right to demurrage, if it exists as a legal right, is confined to the maritime law, and only exists as to carriers by sea-going vessels. But it is believed to exist alone by force of contract. All such contracts of affreightment contain an agreement for demurrage in case of delay beyond the period allowed by the agreement, or the custom of the port allowed the consignee to receive and remove the goods. But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights. Owners of vessels have none. Railroads discharge cargoes carried by them. Carriers by ship do not, but it is done by the consignee. The masters of vessels provide in the contract for demurrage, while railroads do not, and it is seen these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers."

Shortly after this case was decided, the question came before the supreme court of Nebraska in *Burlington & M. M. R. Co. v. Chicago Lumber Co.*, 15 Neb. 390. The court contented itself with a mere reference to the Illinois case, and held that the right to demurrage does not attach carriers by railroads, saying: "It is not plain that this charge was made by virtue of any contract between the shipper and the carrier, nor yet by any statutory enactment permitting it, nor by any use or custom which may possibly have acquired force of law. And we are unable to see how any such charge can be insisted upon in this action. We know of no authority for it, and our attention has been called to none."

The case of *Crommelin v. New York & H. R. Co.*, 10 Bos. (N. Y.) 77, has been cited as an authority against the right of a railroad company to impose such charges, but in fact, this is not a case where a question of right is decided, but a question as to whether a lien was created. JUDGE MONNELL said: "The only question in this case is whether the reg-

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ulation of the defendants to make an extra charge for the detention of their cars known to, and as I think the evidence establishes, acquiesced in, and assented to by the plaintiff, constituted a lien upon the marble which would authorize the defendants in retaining it until the charge is paid." This portion of the decision certainly does not uphold the doctrine of the Illinois case, but is directly against it. Continuing, JUDGE MONNELL says: "I think the transaction as testified to by Baker, constituted it in effect an implied, if not an express, contract that the defendants would charge, and the plaintiff would pay, the extra charge. With notice of the regulation he shipped the marble. There is enough to raise an implied assumpsit, upon which I have no doubt the defendants could recover in an action for that purpose." This case, therefore, and the case in Illinois seem to be directly in conflict with respect to the right to recover demurrage charges; but each case—and it was the only question that was before them,—decided that no lien was created.

Reason for Holding That Railroads Have No Lien on Account of Damages from Detention of Cars by Shipper—Unliquidated Damages.—And in *Hawgood v. One Thousand Three Hundred and Ten Tons of Coal*, 21 Fed. Rep. 681, in which case it was held that a ship owner has a lien upon the cargo for demurrage enforceable in the admiralty although the bill of lading contains no demurrage clause; the court, upon the point as to whether the privilege of demurrage can be exercised where it is not expressly stipulated for in the bill of lading, quoted from *The Hyperion Cargo*, 2 Lowell (U. S.) 94, as follows: "The cases at common law do not afford much aid because it recognizes no general responsibility for the goods to the shipper, but only a right of retainer, which they say cannot be conveniently exercised in support of a demand for unliquidated damages, a point of no consequence in the admiralty. These remarks," said the court, "are applicable to the cases of *Crommelin v. New York & N. H. R. Co.* and *Chicago & N. W. R. Co. v. Jenkins*, both above cited."

## TALLASSEE FALLS MFG. CO.

v.

## WESTERN RY. OF ALABAMA.

*(Supreme Court of Alabama, Dec. 20, 1900.)*

[29 South. 203.]

Judgments.—A judgment entry that on "demurrer to pleas 3, 4, 5, 6, and 9, said demurrer is overruled, and demurrer to replications to fourth plea sustained," etc., does not constitute a judgment either sustaining or overruling the demurrer, hence a party can take nothing by assignments of error based thereon.

Carriage of Freight—Delivery—Validity of Stipulation in Bill of Lading Purporting to Terminate Liability as Common Carrier.—Notwithstanding a bill of lading provided that the railroad company would not



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be liable as a common carrier after the freight had reached its destination, public policy so modified the contract as to give the consignee a reasonable time within which to remove the goods after arrival before such liability ceased.

**Same—Time for Removal of Goods—Custom to Vary Bill of Lading.**—Where a bill of lading expressly provided that the carrier would not be liable as a common carrier after the arrival of the goods at their destination, and the bill was free from ambiguity, evidence that a custom existed allowing plaintiff more than a reasonable time in which to remove freight was properly excluded, since evidence of a local, particular usage was not admissible to change the written contract; such usage being in existence at the time of the execution of the contract, and expressly stipulated against.

**Same—Reasonable Time for Removal of Goods.\***—Plaintiff received 437 bales of cotton, which had been shipped over defendant's road. Plaintiff immediately began to haul the cotton in wagons to its factory, which was six miles distant. The station platform would only hold about 100 bales, and the rest were allowed to remain in the cars until room was made for them on the platform. Six days after its arrival 103 bales on the platform and 25 bales in a car were destroyed by fire. *Held*, that such six days was a reasonable time within which the cotton might have been removed, as a matter of law, and hence the liability of the defendant as a common carrier had ceased, under the bill of lading, providing that liability as a carrier ceased on the arrival of the goods at their destination.

Appeal from circuit court, Montgomery county; J. C. Richardson, Judge.

Action by the Tallassee Falls Manufacturing Company, for the use of insurance companies, against the Western Railway of Alabama, for cotton destroyed by fire. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The first count of the complaint, which was the one upon which the trial was had, claimed damages for failure to deliver certain cotton which the defendant received at Montgomery as a common carrier, and agreed, for a reward, to deliver it to Cowles Station, and is in substantially the Code form. This count was subsequently amended by adding thereto the allegation that the money sued for, when collected, would be the property of the insurance companies for whose use the suit was brought, and who prior to the bringing of the suit had paid plaintiff for said loss, and that thereby the insurance companies had been subrogated to the rights of the plaintiff against the defendant. There were many pleas interposed by the defendant, demurrers to which were overruled. The plaintiff filed several replications, demurrers to which were sustained. Under the opinion on the present appeal, it is unnecessary to set out these rulings upon the pleadings, inasmuch as they are not presented for review.

\*See notes at end of case.

The judgment entry in reference to the rulings upon the pleadings was as follows: "Thereupon defendant, by counsel, demurs to the amended complaint. Being argued by counsel and understood by the court, said demurrer be, and is hereby, overruled. Plaintiff, by counsel, moves to strike pleas 2 and 7. Being argued by counsel and understood by the court, is sustained, and defendant excepts. Demurrer to pleas 3, 4, 5, 6, and 9; said demurrer is overruled, and demurrer to replications to fourth plea sustained by the court, and demurrer to replication to third plea sustained by the court, and demurrer to replication to fifth plea court sustains, and demurrer to replication to sixth plea is sustained by the court. Motion to strike replication to pleas 3, 5, 4, and 6 being argued by counsel and understood by the court, said motion is overruled. Thereupon plaintiff, by counsel, is allowed by the court to plead over, which is done. Demurrer to replication 2 to plea 3, filed June 8, 1899. Court sustains said demurrer. Demurrer to replication 2, filed June 8, 1899, to plea 4, sustained by the court. Demurrer to replication 2, filed June 8, 1899, to plea 5, sustained by the court. Demurrer to replication 2, filed June 8, 1899, to plea 6, the court sustains; and plaintiff, by counsel, is allowed by the court to plead over, which is done. Demurrer to amended replication 2, filed June 8, 1899, to third plea, being argued by counsel and understood by the court, is sustained." The material facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. The plaintiff offered to introduce evidence to prove the existence of a local custom or particular usage which existed between the defendant and the plaintiff, having regard to the removal of cotton at Cowles Station, and under which the plaintiff was allowed as long a time as was necessary to remove cotton shipped to Cowles Station. Upon the introduction of all the evidence, the court, at the request of the defendant, gave the general affirmative charge in its behalf, to the giving of which charge the plaintiff duly excepted. There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Watts, Troy & Caffey, for appellant.

Geo. P. Harrison, for appellee.

Sharpe, J. The recitals found in this record relating to demurrers to pleadings are not such as show or constitute a judgment either sustaining or overruling either of the demurrers, and under the rule established by several decisions of this court upon the effect of such recitals the appellant can take nothing by assignments of error based upon them. *Mercantile Co. v. O'Rear*, 112 Ala. 247, 20 South. 583; *McKissick v. Witz* (Ala.) 25 South. 21; *Blank-*

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enship v. Owens (Ala.) 27 South. 974; Improvement Co. v. Du Bose (Ala.) 28 South. 380; Hereford v. Combs, Id. 582.

The issue joined upon the somewhat meager ninth plea presents substantially the merits of the case. The complaint declares alone upon the contract of carriage. The ninth plea sets up "that the cotton sued for in said complaint was destroyed by fire after the defendant's duty and liability as a common carrier had terminated, and while the goods had been left in its custody as a warehouseman." To this there was no special replication. The uncontradicted evidence shows that 437 bales of cotton were on the 9th of October, 1895, delivered to defendant for shipment to plaintiff at Cowles Station; that they all reached that station not later than the 12th of that month; that defendant received notice of arrival, and paid at least a part of the freight, not later than the 12th, and from that time it proceeded to haul the cotton in wagons to its factory, six miles distant. The platform had capacity for only about 100 bales. After arrival at the station the cotton was allowed to remain in cars, from which they were by defendant unloaded upon the platform, so as to keep it filled with bales as others were hauled from it. Unloading and hauling continued until about 1 o'clock on the 18th of that month, when 103 bales on the platform and 25 bales in a car were destroyed by fire.

The bills of lading under which the cotton was shipped provide that: "The goods shall be received by the owner or consignee at the station or wharf of the carrier at the ultimate

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point of delivery, and, if not taken away immediately on their being landed or discharged, may, at the option of the delivering carrier, be sent to a warehouse, or be permitted to lie where landed, in either event at the expense of the shipper, owner, or consignee. \* \* \*

This contract is executed and accomplished, and the liability of the company as common carriers thereunder terminates, on the arrival of the goods or property at the wharf, station, or depot to which this bill of lading contracts to deliver, and the carrier will be responsible thereafter only as warehouseman." By its terms the bill of lading is made the contract of shipment, and, except so far as it may be modified by the law itself, the parties are bound by them. The provision for terminating the carrier's liability immediately on arrival is subject to the requirement which the law, from public policy, injects into the agreement, which continues the responsibility of a common carrier until a reasonable time and opportunity has been allowed the consignee for receiving the goods. Railroad Co. v. Oden, 80 Ala. 38; 6 Am. & Eng. Enc. Law (2d Ed.) 263, and cases there cited. The stipulation for ending liability is thus modified, but is not abrogated, by the law. It must be read as an agreement to end responsibility of the defendant as a common carrier after the lapse of such reasonable time, and, so read, it may not be changed by proof of local custom or of particular

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usages; and plaintiff's offers to show a custom to allow it a longer time for removing freight was properly rejected. Proof of custom, though proper to be resorted to in some cases, is never admissible to vary or control a written contract which on its face is free from ambiguity, and there are no circumstances to create doubt of the proper application of terms used in the writing. Parties by express stipulations may always exclude any inference that they intend to adopt a custom or usage into their contracts. *Barlow v. Lambert*, 28 Ala. 704; *Cox v. Peterson*, 30 Ala. 608; *Smith v. Insurance Co.*, Id. 167.

The question of what is a reasonable time for receiving from the carrier is often one of mixed law and fact, but when the facts are certain and undisputed the court, and not the jury, should determine it. *Collins v. Railroad Co.*, 104 Ala. 390, 16 South. 140; *Railway Co. v. Ludden*, 89 Ala. 612, 7 South. 471; *Railroad Co. v. Kidd*, 35 Ala. 209; *Hutch. Carr.* § 350. Computation of that time begins when the goods are at the place for delivery, and ready for delivery in the manner usual or adopted by the parties. There can be no inference from the facts in evidence that the cotton was not ready for delivery from the time of its arrival at the station, or that it was left on the cars during the six days thereafter to suit the defendant's purposes, or for any other reason than the plaintiff did not employ means to remove it more speedily. The time it was so allowed to remain unloaded is not chargeable to the defendant as continuing its responsibility, other than as a warehouseman. *Gregg v. Railroad Co.*, 147 Ill. 550, 35 N. E. 343; *Whitney Mfg. Co. v. Richmond & D. R. Co.*, 38 S. C. 365, 17 S. E. 147, 37 Am. St. Rep. 767; *Chalk v. Railroad Co.*, 85 N. C. 423, 9 Am. & Eng. R. Cas. 106. In *Collins v. Railroad Co.*, supra, it was held, as matter of law, that six days was more than a reasonable time for receiving from the carrier; and in *Railway Co. v. Ludden*, supra, it was held, as a legal conclusion, that three days was more than a reasonable time for receiving freight, which in that case consisted of a piano.

We hold that the ninth plea was sustained by the facts, and that the defendant was therefore entitled to the general affirmative charge given in its favor. In the rulings on evidence there is no error prejudicial to the appellant. The judgment will be affirmed.

## NOTES.

**Limiting Duration of Liability as Carrier by Stipulation in Bill of Lading.**—The liability of a railroad company as a common carrier continues after the goods have been carried to the place of destination and stored in the depot until the consignee has had notice and a reasonable time to remove them, after which it is only liable as warehouseman; yet it may stipulate by contract that its liability as carrier shall cease when the

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goods have been stored in its depot at the place of destination, when it shall be liable as warehouseman. *Western R. Co. v. Little*, 37 Am. & Eng. R. Cas. 659, 86 Ala. 159, 5 So. Rep. 563; *South & N. Ala. R. Co. v. Wood*, 66 Ala. 167; *Buckley v. Great Western R. Co.*, 18 Mich. 121; *Alabama & T. R. R. Co. v. Kidd*, 35 Ala. 209.

A stipulation in a bill of lading issued by a transportation company that goods received for shipment at Boston are "to be forwarded to Louisville depot only," does not relieve the carrier from its duty to properly care for them after their arrival at the latter place. *Merchants' D. & T. Co. v. Merriam*, 31 Am. & Eng. R. Cas. 78, 111 Ind. 5, 11 N. E. Rep. 954.

But in *Allan v. Pennsylvania R. Co.* (Penn.), 10 Am. & Eng. R. Cas., N. S., 347, it was held that a provision of a bill of lading that the goods shall be delivered on the carrier's platform at a certain station, the freight business at which is insufficient to justify the maintenance of structures for the protection of freight from the weather, and remain thereon at the shipper's risk until removed, is a valid limitation of the liability of a common carrier; and relieves the carrier from the duty of notifying the shipper of their arrival at such station.

**Stipulation Construed to Provide Only for Termination of Liability as Common Carrier.**—A stipulation in a bill of lading that the carrier will not be "liable for damages, (either from fire or other cause) as common carrier, for any article after it has been transported to its place of destination and has been placed in the depot of the company," is intended to fix a period, after the transportation is complete, when the goods pass from the custody of the company as a carrier, to its keeping as a warehouseman, and is reasonable and valid. *Western R. Co. of Alabama v. Little* (Ala.), 37 Am. & Eng. R. Cas. 659, 86 Ala. 159, 5 So. Rep. 563.

In this case the court said in delivering its opinion: "The courts of many other states, and doubtful if not the weight of authority, maintain the rule that from the necessary manner in which the business of railroad companies is conducted, and from their custom to have platforms on which to place, and warehouses or depots in which to store goods carried, the company discharges its whole duty as a carrier when it stores the goods in the warehouse or depot, to keep until called for, if the consignee or owner is not there to receive them; and that such delivery from themselves as common carriers to themselves as keepers for hire terminates their responsibility as common carriers; that in such case the company ceases to be a common carrier on the completion of the duty of transportation, as matter of law, and assumes as matter of fact, the character of warehousemen. *Rice v. Hart*, 118 Mass. 201; *Gashweiler v. Wabash, St. L. & Pac. R. Co.*, 83 Mo. 112, 25 Am. & Eng. R. Cas. 403; *Rothschild v. Michigan Cent. R. Co.*, 69 Ill. 164; *McCarty v. New York, etc., R. Co.*, 30 Pa. St. 247; *Mohr v. Chicago & N. W. R. Co.*, 40 Iowa 580; *Butler v. East Tenn. & V. R. Co.*, 8 Lea (Tenn.) 32, 9 Am. & Eng. R. Cas. 249. This rule certainly has the merit of being definite, and easy of application. Certainly a stipulation which terminates the company's responsibility as carrier on the completion of the transportation and storage of the goods in the depot—a contractual regulation of the place, time, and

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manner of delivery, substituting a rule sustained by courts of the highest authority for the rule established in this state—cannot be regarded as opposed to law or public policy. By the terms of the bill of lading, the defendant's responsibility as a common carrier terminated when the goods were transported to Auburn, and safely stored in the depot. The liability thereafter was that of a warehouseman." See also, *Constable v. National Steamship Co.*, 154 U. S. 51, 14 Sup. Ct. Rep. 1062; *Feige v. Michigan Cent. R. Co.*, 62 Mich. 1, 28 N. W. Rep. 685.

**When Carrier's Liability as Warehouseman Begins.**—See *Berry v. West Virginia & P. R. Co.* (W. Va.), 11 Am. & Eng. R. Cas., N. S., 103, and *notes*, 111 *et seq.*

**Reasonable Time for Removal of Goods after Their Arrival at Destination—Question for Jury.**—See *Berry v. West Virginia & P. R. Co.* (W. Va.), 11 Am. & Eng. R. Cas., N. S., 103, and *note*, 120 *et seq.*

**Whether Notice to Consignee of Arrival of Goods is Essential.**—See *notes*, 10 Am. & Eng. R. Cas., N. S., 352 *et seq.*

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TATE *et al.*

*v.*

YAZOO & M. V. R. CO.

(*Supreme Court of Mississippi, Feb. 18, 1901.*)

[39 So. Rep. 392.]

**Carriers—Delivery to Carrier—What Constitutes—Side Track.\***—The plaintiffs operated a cotton gin at a town where defendant railway company had no station or agent. Cotton was shipped by plaintiffs by notifying the conductor of a local freight train to leave a car on the siding. They loaded the car and flagged the train on which they desired to send it, the conductor of which then gave them a bill of lading. Pursuant to this plan they loaded a car with cotton in the evening after the only local freight for the day had passed, and there would be no other until the evening of the next day. During the night the cotton was destroyed by fire. *Held* not to constitute a delivery to and acceptance by the railroad company, so as to make them liable for the value of the cotton.

Appeal from circuit court, Tunica county; F. E. Larkin, Judge.

Action by Tate & Co. and others against the Yazoo & Mississippi Valley Railroad Company. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

F. A. Montgomery, Jr., for appellants.

Mayes & Harris, for appellee.

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\*See notes at end of case.

*Tate v. Yazoo & M. V. R. Co*

Terral, J. The appellee in this case recovered judgment by a peremptory instruction, and the appellant insist that a peremptory instruction should have been given in their behalf. On the 28th of September, 1897, the appellants loaded upon a car of the defendant company at Clacks station 24 bales of cotton. The loading of the car was finished after sundown, and after the local freight train of that day, which was accustomed to take loaded cars from Clacks, had passed on its return trip to Memphis; and no other local freight train, by which alone cotton was shipped from Clacks, would arrive at said station until the evening of the next succeeding day. Early on the morning of the 29th of September the car load of cotton was wholly consumed by fire; and this suit, being a consolidation of five suits, is to recover its value. Tate & Co. operated a public gin at Clacks, where the defendant company had a siding, but it had no station house or agent at that point. Japson and Keesee, who were in charge of Tate & Co.'s gin and plantation at Clacks, testified that when it was desired to ship cotton one of them would inform the conductor of the local freight train, and the conductor would set out there an empty car for loading; and that when the car was loaded, and ready for transportation, the local freight train desired to take the loaded car would be flagged, and the conductor of it informed that the car was ready for transportation, when the conductor would sign the shipper's loading account, if found correct, and attach the car to his train, and transport it to its destination. The contention of the appellants is that they had delivered the 24 bales of cotton to the defendant company, and that the cotton was burned while in its custody; that the cotton was actually or constructively delivered to the railway company, and that it is chargeable for the loss. We think, however, that it is quite clear that the railway company had never come into the possession of the cotton for transportation. The car, it was true, was the car of the company, and it was placed upon the company's siding at Clacks for being loaded, and the cotton was loaded into the car, but no servant of the company had any notice of the car being loaded and ready for shipment. Keesee testifies that his recollection was (the trial being had some time after the loss) that, when the car was loaded, a man was left there with it, with the shipping account filled out, in order to stop the train, and get the conductor's receipt for it. And it appears that the flagging of the local freight train and delivery of the shipper's loading account to the conductor was an essential feature of the shipping of cotton at Clacks. But Japson and others conclusively show that the local freight train for that day had already passed before the car was loaded, and no other train that could have been expected to take the car would come by there until after the car was burned. There was no constructive delivery of the cotton to the railroad company. Its proper servant, the conductor of

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the local freight train, by which it was desired to have this cotton transported, knew nothing of its being loaded into the car for shipment; and there could be no acceptance of the cotton for shipment without such knowledge, unless, indeed, there had been an agreement between the parties making the mere loading of the car an acceptance of the freight for transportation. But no such agreement was shown; on the contrary, the clear course of dealing between the parties at Clacks showed that the shipper was to flag the proper local freight train, and deliver to the conductor of the train the car to be transported with the shipper's loading account thereof. A bill of lading is not essential to charge the carrier with the duty of safely transporting the property delivered for carriage, but the doing of the several acts entitling the shipper to a bill of lading is necessary to charge the carrier with the safety of the articles intrusted to him. In this case, according to the course of dealing between the parties, there could have been no delivery of the cotton to the railroad company until it was loaded, and the local freight-train conductor had notice of the items of freight, its destination, and of its readiness for transportation. Parties desiring to hold common carriers to a stricter responsibility than that imposed by the common law should provide therefor by contract; for, unless bound by contract, otherwise a carrier is not responsible for the safety of articles intended for shipment until a delivery of them to him and an acceptance thereof, and there can be no acceptance until he has knowledge of their readiness for transportation and the shipper's desire therefor. Hutch. Carr. c. 4; Schouler, Bailm. c. 3; Ang. Carr. c. 140; 2 Kent, Comm. \*608; Railroad Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301, 303.

Affirmed.

## NOTES.

**When Relation of Shipper and Carrier Begins.**—The relation of shipper and carrier does not begin between the owner of goods and a railway company though the goods may have been delivered to the carrier, if after such delivery anything required either by law or the contract remains to be done by the shipper. *Dixon v. Central of Georgia Ry. Co.* (Ga.), 17 Am. & Eng. R. Cas., N. S., 380. See also, *note* at end of case, p. 397.

**Goods on Spur Track—Necessity of Moving in Order to Weigh.**—Where goods to be shipped are situated upon a spur track of a railway company, and the owner has no track scales, thus rendering it necessary to move the loaded cars to the company's depot for the purpose of weighing the same, so as to ascertain the proper amount of freight charges, the delivery of such cars will be treated as having been made to the company at such depot. *Dixon v. Central of Georgia Ry. Co.* (Ga.), 17 Am. & Eng. R. Cas., N. S., 381.

**In Car on Side Track with Carrier's Consent.**—Where goods are loaded on a car of the carrier standing on its side track, with the carrier's con-



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sent, and the car is under its exclusive control, they are delivered to the carrier, as much so as if deposited in its warehouse by the shipper. *Illinois Cent. R. Co. v. Smyser*, 38 Ill. 354, 87 Am. Dec. 301.

In *Cars on Side Track—Refusal of Station Agent to Ship*.—In the absence of a custom or a regulation of the railroad company making such loading a delivery to the carrier, loading freight on a car standing on a side track is not a delivery to the company where the station agent declines to ship the goods. *Yoakum v. Dryden* (Tex. Civ. App.), 26 S. W. Rep. 312.

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WEBER CO.

v.

CHICAGO, ST. P., M. & O. RY. CO.

(*Supreme Court of Iowa, Jan. 28, 1901.*)

[84 N. W. 1042.]

**Receiving Sample Cases as Baggage—Exemption from Liability.\***—Where plaintiff knew of a regulation of defendant railroad company forbidding their baggage men to receive jewelers' sample cases for transportation as ordinary baggage, without the execution of a bond to release the company from liability in case of loss, he could not recover for the loss of such samples, though defendant's own agent induced its baggage man to receive the samples without the bond.

**Same—Whether Carrier Liable as Warehouseman.**—Plaintiff could not recover for the loss of such samples received by defendant's baggage man on the ground that they were lost because of defendant's negligence in its capacity as a warehouseman.

**Same—Rules—Exemption from Liability.**—Code, § 2074, declaring that no railroad shall exempt itself from liability as a carrier by any contract, does not apply to a rule that a company's baggage men should not receive jewelers' sample cases for transportation as ordinary baggage unless the owner had secured a permit from the company.

**Same—Same—Waiver.**—Where defendant railroad's baggage man knowingly received a jeweler's sample cases for transportation as ordinary baggage, contrary to a rule of the company, of which the owner had knowledge, there was no waiver of objections to receiving such merchandise as baggage by defendant's refusal to refund a sum paid thereon for excess baggage.

Appeal from district court, O'Brien county; F. R. Gaynor, Judge.

This action was commenced in 1891 to recover the value of certain jewelry contained in a jeweler's sample case, which was delivered by a traveling agent of plaintiff to the defendant to be transported as baggage. From a judgment for plaintiff upon a verdict, defendant appealed to this court, and the judgment was reversed. See 92 Iowa,

Case Stated.

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\*See notes at end of case.

364, 60 N. W. 637. After the case was remanded to the lower court, plaintiff amended his petition, and another trial was had, at the conclusion of which the court sustained a motion to take the case from the jury, and directed the jury to bring in a verdict for defendant. From the judgment for defendant rendered on a verdict returned in pursuance of this ruling, the plaintiff appeals. Affirmed.

Geo. E. Clark, for appellant.

Wright, Call & Hubbard, for appellee.

McClain, J. The trunk containing the jewelry in question was one of three trunks checked by plaintiff's agent as the holder of a ticket entitling him to transportation as a passenger, and to have his baggage transported as a part of the same contract. When it appeared that the weight of the trunks was greater than the amount of baggage allowed to be carried free, plaintiff's agent paid 50 cents charges for excess baggage, and received a receipt therefor. Subsequently, and before the trunks were placed in the baggage car of the train, one of them disappeared, and it is for the contents of this trunk that action is brought. It further appeared on the trial that there was a rule of the company to the effect that agents must not receive jewelry sample cases for storage, or check them as baggage, under any circumstances, without the presentation by the passenger of a permit from the general officer of the company, and that such permit could be secured only by executing a bond to hold the company harmless from all causes of action, claims, demands, and judgments, in excess of the sum of \$50, which might arise or grow out of the transportation or storage by said company of such trunks and sample cases. It appears that plaintiff was fully advised as to the existence of this rule, and applied to the general office of the company for a permit, and tendered a bond in compliance with the regulation, but, upon this bond being returned to it as insufficiently executed, the plaintiff took no further steps towards furnishing a bond or procuring a permit, and sent its agent out with its sample cases, to be checked as general baggage. On the former appeal it was decided that a special finding of the jury to the effect that plaintiff had no knowledge of the regulation of the company in regard to sample trunks containing jewelry was without support in the evidence; but as to the second finding, that the baggage agent of defendant when he checked the trunk in controversy as baggage knew, or had reason to know, that it was a jeweler's sample trunk, there was such conflict in the evidence as not to require a reversal on the ground that such finding was unwarranted. The court held, on the former appeal, that, if plaintiff had good reason to know of the existence of the regulation, it was charged thereby as fully as though it had actual knowledge, and that an instruction requiring actual knowledge in order to make such regulation

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binding upon it was erroneous. If the plaintiff had such reasonable knowledge of the regulation with reference to jewelry sample cases, and the evidence of that fact is conclusive, then it could not hold the company liable for jewelry samples, even though its agent induced the baggage agent to check them without the permit required by the regulations. Plaintiff is directly chargeable with notice of the limitation of the power of the baggage agent to render the company liable for jewelry samples, except in the method prescribed by the regulation. We should not care to go as far as the Massachusetts court has gone, and hold that a baggage agent has not the implied authority to accept merchandise as baggage, waiving the objection on that ground. *Blumantle v. Railroad Co.*, 127 Mass. 322. But we do hold that where the agent's authority is expressly limited in this respect, and the limitation is known to the passenger, the act of the agent in violation of the regulation will not bind the company, unless something in the nature of a waiver of the regulation is shown, and there is nothing of the kind in this case.

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Sample Cases as  
Baggage—Ex-  
emption from  
Liability.

Appellant, while apparently conceding that the defendant did not become liable for these jewelry samples as baggage, still insists that there was a liability for them as warehouseman, and that there was evidence to go to the jury that there was negligence on the part of the agents of the defendant in caring for the trunk such as would charge the defendant with loss thereof in that capacity. But the baggage agent had no more authority to receive these jewelry samples for the company as warehouseman than as carrier. His want of authority to receive them in any capacity was known to appellant, and therefore no liability on the part of defendant in that respect was incurred. Indeed, it is preposterous, under the plain facts of the case, to attempt to charge this defendant with more than \$1,000 worth of jewelry without payment of extra compensation, except the compensation paid because of the weight of the trunks checked, and in the face of a known regulation that jewelry samples should not be received without a permit. To deliver to the agent of the carrier for checking trunks containing property of this character and value, without notice to the agent of their contents, was a fraud upon the company, which would relieve the company from any liability whatever, even for gross negligence of its servants. In the case of *Dunlap v. Steamboat Co.*, 98 Mass. 371, which was a case involving the liability of a carrier for a sum of money in excess of that necessary for reasonable traveling expenses contained in a valise which was delivered to the carrier, the court said that the carrier did not agree to receive or transport money beyond a reasonable amount, or merchandise of any kind, and that he could not be held liable for any, even the smallest, degree of care for that which he did not agree to take into his posses-

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sion and keeping; and it uses this pertinent language: "That is the exact difference between the class of cases where a carrier has by special contract given notice that he will not be responsible for loss of property beyond a certain amount and those cases where a concealment or deceit as to the nature and value of the property has been practiced on the carrier. As to the former, it has been held that the effect of such a notice is only to exempt the carrier from his extreme liability for property intrusted to him, but that he is still liable for a certain degree of care for property which he receives into his custody and undertakes to transport, although of greater value than that named in the notice which he has made public. But in the latter class of cases there is present 'the element of fraud or deceit, by reason of which the carrier has not entered into any contract for the care of property the knowledge of which has been concealed from him by the owner.'" Appellant seems to think that the provisions of Code, § 2074 (which was

Same—Rules—  
Exemption from  
Liability.

in force at the time this cause of action arose as section 1308, Code 1873), to the effect that no railway company shall by any contract, receipt, rule, or regulation exempt itself from the liability of a common carrier or carrier of passengers which would not exist had no such contract, receipt, rule, or regulation been made, have some bearing on this case, and argues that the defendant had no right to make a regulation in regard to liability for jewelry samples. But any such position is clearly untenable. A common carrier of passengers is not bound to receive and become liable for merchandise as baggage. It may absolutely refuse to check as baggage that which is merchandise, and it may therefore make any regulations in regard to the waiver of those objections which it sees fit to adopt. If there is no waiver, then it is not liable to any extent for merchandise which is checked as baggage.

Finally, it is contended that the failure of defendant to tender a return of the 50 cents received for excess baggage is a waiver on its part of any objection that merchandise was checked as baggage. But this sum was received

Same—Same—  
Waiver.

as above indicated, not for the transportation of merchandise, but for the transportation of excess-weight baggage. The payment of that sum was a necessary and proper condition to the checking of these trunks at all, and, when they were checked in compliance with the regulation requiring the payment of that sum as charges for excess weight, the defendant became entitled to the money which it received. It is not seeking to rescind any contract for fraud, but is simply seeking to avoid liability not involved in the contract which was made. The appellant got what was paid for; that is, the privilege of carrying excess weight of baggage. It did not get the privilege of carrying merchandise; for no such privilege was ever contracted for. This would be true if the agent had no knowledge that the trunk in question con-

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tained merchandise. But appellant contends that, if the baggage agent was chargeable with knowledge of the contents of the trunks, then, although he had no authority to bind the defendant by acceptance, the retention by defendant of the money received for excess baggage, after knowledge of the agent's action in excess of authority, would be a waiver of the objection, and render the defendant liable. It would, however, constitute fraud on the part of plaintiff to induce the agent of defendant to receive these samples as baggage in violation of defendant's known rule, and with the purpose of holding defendant responsible therefor. In *Construction Co. v. Maiken*, 103 Iowa, 118, 72 N. W. 431, an exception is recognized to the general doctrine that one who seeks to disaffirm an unauthorized act of his agent must return the money received by the agent under such contract, to the effect that "one who attempts to rescind a transaction on the ground of fraud is not required to restore that which he would be entitled to retain either by virtue of the contract sought to be set aside or of the original liability." (Page 126, 103 Iowa, and page 433, 72 N. W.) And see *Bebout v. Bodle*, 38 Ohio St. 500; *Hendrickson v. Hendrickson*, 51 Iowa, 68, 50 N. W. 287. The excess charge was on all three trunks as a whole. If they had contained nothing but personal baggage, the charge would have been properly received. The fact that appellant's agent fraudulently placed therein jewelry samples, even with knowledge of defendant's agent, but well knowing that he could not consent thereto, would not make it necessary for defendant to return this charge, lawfully received, in order to avoid liability for the merchandise. The lower court properly directed a verdict for defendant, and the judgment is affirmed.

Ladd, J., took no part.

## NOTES.

**Merchandise as Baggage—Authority of Carrier's Agents.**—Where the duly authorized agent of a railroad company receives personal property to be transported as baggage, the railroad company must account for such property as baggage, although in strict language it might not be baggage. *Chicago, R. I. & P. R. Co. v. Conklin*, 16 Am. & Eng. R. Cas. 116, 32 Kan. 35, 3 Pac. Rep. 762.

**Receiving Merchandise as Baggage with Knowledge of Its Real Character—Estoppel.**—It is generally held that where the carrier or his agent receives general merchandise as baggage, knowing its real quality the carrier is estopped from denying that it was baggage.

*United States.*—*Hannibal, etc., R. Co. v. Swift*, 12 Wall. (U. S.) 262, 1 Am. Ry. Rep. 434; *Central Trust Co. v. Wabash, etc., Ry. Co.*, 39 Fed. Rep. 417, 40 Am. & Eng. R. Cas. 636.

*Dakota.*—*Waldron v. Chicago, etc., R. Co.*, 1 Dakota 351, 46 N. W. Rep 456.

*Kansas.*—*Chicago, etc., R. Co. v. Conklin*, 32 Kan. 55, 16 Am. & Eng. R. Cas. 116, 3 Pac. Rep. 762.

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*Massachusetts*.—*Blumantle v. Fitchburg R. Co.*, 127 Mass. 322, 34 Am. Rep. 376.

*Missouri*.—*Minter v. Pacific R. Co.*, 41 Mo. 503; *Ross v. Missouri*, etc., R. Co., 4 App. 583.

*New York*.—*Butler v. Hudson River R. Co.*, 3 E. D. Smith (N. Y.) 571; *Perley v. New York Cent.*, etc., R. Co., 65 N. Y. 375; *Stoneman v. Erie R. Co.*, 52 N. Y. 429.

*Ohio*.—*Bowler and Benedict Co. v. Toledo*, etc., R. Co., 10 Ohio Cir. Ct. Rep. 272; *Toledo*, etc., R. Co. *v. Ambach*, 10 Ohio Cir. Ct. Rep. 490.

*Oregon*.—*Oakes v. Northern Pac. R. Co.*, 20 Ore. 393, 23 Am. St. Rep. 126, 47 Am. & Eng. R. Cas. 437, 26 Pac. Rep. 230.

*Texas*.—*Texas & P. R. Co. v. Capps*, 16 Am. & Eng. R. Cas. 118, 2 Tex. App. (Civ. Cas.) 35.

*Wisconsin*.—*Hoeger v. Chicago, M. & St. P. R. Co.*, 63 Wis. 100, 21 Am. & Eng. R. Cas. 308, 23 N. W. Rep. 435, 53 Am. Rep. 271.

*England*.—*Great Northern R. Co. v. Sheperd*, 8 Exch. 30, 21 L. J. Exch. 286, 7 Railw. Cas. 310; *Macrow v. Great Western R. Co.*, L. R. 62 B. 612.

Although samples carried by a passenger are not personal baggage, yet, if the baggage master, knowing the character of the articles carried, accepts them as baggage, the carrier is estopped to deny that they were baggage in an action for their loss. *Texas*, etc., R. Co. *v. Capps*, 16 Am. & Eng. R. Cas. 118, 12 Tex. App. (Civ. Cas.) 35.

**Authority of Baggage Master—Presumptions.**—The presumption is that a railroad baggage master has authority in regard to matters pertaining to checking baggage. *Coffee v. Louisville & N. R. Co.* (Miss.), 14 Am. & Eng. R. Cas., N. S., 423.

**Same—Property Not Having the Appearance of Baggage.**—Where property is offered by a passenger, but not so packed as to assume the outward appearance of ordinary baggage, or as to deceive or to conceal its true character, it is within the scope of the agent's business and duty to decide whether the company will receive and carry it as baggage, and if so received, to be forwarded, the company is liable. *Waldron v. Chicago & N. W. R. Co.*, 1 Dak. 351, 46 N. W. Rep. 456, 1 Dak. T. 336.

**Checking Sample Trunks—Releasing from Liability—Rules—Authority of Baggage Master.**—A baggage master stands in the place of the railroad; and a rule requiring baggage masters to exact a release of liability from commercial travelers, as a condition precedent to checking their sample trunks, is not admissible in evidence, in an action for the loss of such baggage, where the passenger had not been required to sign a release, and had no knowledge of the rule. *Trimble v. New York Cent. & H. R. R. Co.* (N. Y.), 17 Am. & Eng. R. Cas., N. S., 176.

**Checking Trunk in Violation of Rule—Liability for Loss.**—If a baggage master receives and checks a trunk, and it is lost before the passenger purchases a ticket, the company is liable, though the baggage master may have violated a rule of the company in so checking it, unless the existence of such rules is brought to the knowledge of such owner. *Lake Shore & M. S. R. Co. v. Foster*, 104 Ind. 293, 54 Am. Rep. 319, 4 N. E. Rep. 20.

**Effect of Railroad Agent's Knowledge of True Character of Property—Samples of Jewelry.**—Where a trunk is checked containing samples

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of jewelry used by a traveling salesman, the contents being made known to the agent who checks it, the carrier is liable for its loss as for ordinary baggage. *Jacobs v. Tutt*, 33 Fed. Rep. 412; *Texas & P. R. Co. v. Capps*, 16 Am. & Eng. R. Cas. 118, 2 Tex. App. (Civ. Cas.) 35; *Hoeger v. Chicago, M. & St. P. R. Co.*, 21 Am. & Eng. R. Cas. 308, 63 Wis. 100, 23 N. W. Rep. 435, 53 Am. Rep. 271.

**Same—Drummers' Trunks.**—In *Strouss v. Wabash, etc., R. Co.*, 17 Fed. Rep. 209, it was held that if the agent having control over the receipt of baggage, was informed, or knew what was contained in the drummer's trunks and no misrepresentation was made by the owner to the agent having charge of the business of checking the baggage, the carrier was liable for their loss as baggage.

**Same—Commercial Travelers' Trunks and Sample Cases as Baggage.**—In *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348, it was held that if a commercial traveler brings a trunk to the depot, which in fact contains costly jewelry, of the value of \$30,000 and gives no notice of its contents, and has the same checked as ordinary baggage, and there is nothing about the trunk indicating its contents, and the same is consumed by fire, while being carried, the company not being guilty of gross negligence in respect to the origin of the fire or in attempting to extinguish the same and save the baggage, it cannot be held liable for the contents of the trunk. "But," say the court, "conceding it was of such weight and structure as the baggage master must have known it was a commercial traveler's trunk, he had no reason to suspect that, in addition to the articles usually carried by a traveler, it contained valuable jewelry comprising a stock equal, if not exceeding in value that which is commonly kept in a retail store. Appellee presented it as ordinary baggage, and the officer of the company had the right to rely upon the representation, arising by implication, that it contained nothing else. The law imposed no obligation upon him to make any inquiry as to the contents. Had the agent of the company been informed of the contents of the trunk, or had it been so packed that the nature of its contents was discernible, and the company with such knowledge, undertook to carry the goods, there is no reason why it should not be liable as a common carrier, and so the authorities hold. But that is not this case. The carrier in this case, had no knowledge of the contents of the package, either direct or constructive."

**Same—Massachusetts's Rule.**—But in Massachusetts it is held that the mere fact that the baggage master of a carrier knows or has reason to believe that a trunk which he checks contains merchandise, will not suffice to make his principal liable for the merchandise as baggage; and that the carrier can only be bound, if at all, where there is a special agreement to the effect that the merchandise shall be considered as baggage. It may be inferred that even such a special agreement would not bind the carrier, for in *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322, the court said that there was no evidence "that the baggage master had any authority to receive freight on a passenger train, or to bind the corporation to carry merchandise as personal baggage." See also, *Alling v. Boston R. Co.*, 126 Mass. 121.

Proof that a passenger had a package of merchandise checked as baggage, the baggage master knowing that it was merchandise, and that

## Commonwealth v. Keary

other passengers had similar packages checked, does not warrant a finding that the carrier had agreed to carry it as merchandise, or to become liable for it as a common carrier, where there is no evidence that the baggage master had authority to receive freight to be carried on passenger trains, or to bind the carrier to carry merchandise as personal baggage. *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322.

**Effect of Mere Appearance of Baggage.**—Where a passenger presents a trunk, of the appearance and size ordinarily used by traveling salesmen for samples, to the baggage agent of a railroad, and receives a check for it as personal baggage, the agent having no knowledge that it contained merchandise, no recovery can be had for the loss of a stock of jewelry contained in such trunk. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 40 Am. & Eng. R. Cas. 636, *reversed*; *Humphreys v. Perry* (U. S.), 54 Am. & Eng. R. Cas. 29.

**Shipping Merchandise as Baggage—Effect of Knowledge of Connecting Carrier's Baggage Master.**—Where the only authority given by a railroad company to the baggage agent of a connecting road is to check baggage to all stations on the line of the former road, no presumption follows that such agent has authority to check merchandise over the line of said road under the guise of baggage; and knowledge on the part of such agent that a passenger's trunks contain merchandise, and not baggage, is not sufficient to charge such company with knowledge. *Toledo & O. C. R. Co. v. Bowler & Burdick Co.* (Ohio), 19 Am. & Eng. R. Cas., N. S., 574.

**Effect of Knowledge of Ticket Agent Not Acquired Officially.**—In an action against a railroad for failure to deliver a valise and its contents, plaintiff claimed that defendant accepted the valise for carriage with knowledge that it contained merchandise, and not personal baggage; and contended that the fact that shortly before the purchase of her ticket she opened the valise in the sitting room of the depot, and took from it two pair of sleeveholders, which she sold to the defendant's agent, from whom she afterwards purchased the ticket, and who checked the valise, showed such knowledge. *Held*, that the rule that the master is not bound by the knowledge of his employee acquired by the latter outside of the line of his duty was applicable. *Central of Georgia Ry. Co. v. Joseph* (Ala.), 18 Am. & Eng. R. Cas., N. S., 659.

## COMMONWEALTH

v.

KEARY.

*(Supreme Court of Pennsylvania, March 11, 1901.)*

[48 Atl. Rep. 479]

**Carriers—Sale of Tickets—Constitutional Law.**\*—Act May 6, 1863 (P. L. 582), entitled "An act to prevent fraud upon travelers," and making

\*See notes at end of case.



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it unlawful for any person not an authorized agent of the carriers to sell a passenger ticket, is a proper police regulation, not violative of any constitutional provision.

Appeal from superior court.

Edward P. Keary was convicted of selling a passenger ticket in violation of Act May 6, 1863 (P. L. 582), and from a judgment of the superior court affirming the judgment of the court of quarter sessions of Allegheny county, he appeals. Affirmed.

The opinion of the superior court, per Porter, J., and the act of May 6, 1863, are as follows:

Opinion of superior court: "The defendant admits that he carried on the business of buying and selling railroad tickets in the city of Pittsburg. In defense he challenges the constitutionality of the act of May 6, 1863, under which his conviction was had. The question has been raised heretofore, directly, but once in Pennsylvania, and then flatly decided. The late Judge Ludlow, of Philadelphia county, in *Com. v. Wilson*, 14 Phila. 384, filed in 1880 an opinion covering the entire case now presented to us. This opinion seems to have satisfied the minds of the profession for twenty years. Now, however, the identical question is reopened. The act is nearly two score years old, and has been the ground of action in many courts in many cases. True, lapse of time will not obliterate from legislation the stamp of unconstitutionality, but something may be predicated of it in favor of constitutionality. In *Sleeper v. Railroad Co.*, 100 Pa. St. 259, it was held that the act of 1863 did not preclude recovery in the case of a purchaser of a railroad ticket from an unauthorized agent outside of the state, where the railroad company refused to carry the passenger. But the validity of the act and the operative force of its provisions were tacitly conceded. The legislation thus passed under the eye of the supreme court without challenge as to its constitutionality. In view of this fact and of the age of the act, the language of Mr. Justice Mitchell in the recent case of *In re Sugar Notch Borough*, 192 Pa. St. 349, 43 Atl. 985, is peculiarly apt in application to the case in hand. He says, in speaking of the borough act of 1887: 'It has been in operation for twelve years, has been twice previously before this court, and has been the ground of action many times before other courts, without objection to its constitutionality. It is rather late now to question it. While these circumstances are not conclusive in its favor, yet they are a strong argument that it is not so plainly repugnant to the constitution as it must be to require a court to overturn an act of the legislature.' It is furthermore to be recalled that nothing but a clear violation of constitutional provisions—a manifest attempt to exercise prohibited power—will justify the judicial department in declaring unconstitutional, and thereby nullifying, legislative action. *Powell v. Com.*, 114 Pa. St. 265, 7 Atl.

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913; *Railroad Co. v. Riblet*, 66 Pa. St. 164. Upon him who denies the constitutionality of legislation lies the burden of demonstration.

"The appellant contends that the act under which he was convicted is in violation of the fourteenth amendment of the constitution of the United States, which declares that 'no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' Again, he contends that the act is in derogation of the rights 'of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness,' declared by the state constitution to be 'inherent and indefeasible.' He also asserts that the act violates the constitution of the United States, in that the act impairs the obligation of contracts,' and 'is an attempt to regulate commerce \* \* \* among the several states.' These contentions raise large questions. Were they new, the temptation would be strong, and the duty plain, to discuss them with considerable elaboration. We have seen, however, that in Pennsylvania they have long ago been considered at length and carefully determined in an opinion by a judge of recognized ability. Further than this, acts substantially the same in provision have been adopted in other states. These have been directly passed upon by many courts. In every case all or some of the same questions as those here raised have been reviewed in detail with manifest care and at great length. In all of the adjudicated cases, save one, the acts have been declared constitutional, and their provisions upheld. It is believed that, at the expense of some labor, all of the reported cases have been collected and examined by us in which the question here involved has been considered. They are as follows: *Com. v. Wilson* (1880) *supra*; *Fry v. State* (1878) 63 Ind. 552; *State v. Corbett* (1894) 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; *Burdick v. People* (1894) 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152; *People v. Warden of City Prison* (1898) 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264; *Jannin v. State* (Tex. Cr. App. 1899) 51 S. W. 1126; *Railroad Co. v. McConnel* (C. C. Tenn. 1897) 82 Fed. 65. And see *State v. Bernheim* (Mont. 1897) 49 Pac. 441. All of these cases are in substantial accord; the case of *People v. Warden of City Prison*, *supra*, being the exception. In that case the appellate division of the supreme court of New York, apparently unanimously, held the act then under review to be constitutional. On appeal the judgment was reversed. In the opinion of the court of appeals, written by the chief justice, three of the associate justices concur. The remaining three of the associate justices dissent, two of them filing dissenting opinions. In that case, under the construction put upon the act by the court, a duly-constituted agent of

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one railroad company had power to buy and sell tickets of other carriers. It will be seen that the Pennsylvania act contains no provision susceptible of the construction upon which the majority of the court of appeals of New York have in large measure based their conclusions and decree. It is, therefore, not necessary to concede that this New York case is an authority in favor of the appellant's contention in the case before us. In view, then, of these reported adjudications, with their wealth of discussion, it seems unnecessary to rehearse the reasoning by which the courts have been led to an almost unanimous conclusion that acts of the character of that before us are not violative of constitutional inhibition, but are within the police power of the state. The reasoning runs in all of the cases along the same lines. We need but add the conclusions which impel us to affirm the judgment of the court below:

"The act does not impair 'the obligation of contracts,' since the contracts alleged to be affected by the act had no existence until nearly forty years after its passage. The act does not violate the constitutional provision respecting interstate commerce. It is not an attempt to make a rule affecting interstate commerce. It is a police regulation affecting the person and conduct of those attempting to do certain acts which have been forbidden under penalty. 'Legislation may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it, within the meaning of the constitution.' *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547. The act is not in violation of the provisions of the fourteenth amendment. 'Neither the amendment, broad as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed the "police power," to prescribe regulations to promote the health, peace, morals, education, and good order of the people.' *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923. The act of 1863 does not abridge any privilege or right secured to citizens either by the constitution of the United States or by that of the commonwealth; nor does it deprive any of property without due process of law. It does not deprive the holder of a railroad ticket of the unused portion of it. It regulates the sale, and requires the company issuing to buy. The regulation may in some cases result in the holder receiving less than would be paid by an individual buyer. On the other hand, the act gives to the holder of an unsalable, unused portion of a ticket a customer, in the company issuing it. The purchaser of a railroad ticket takes it subject to such reasonable restrictions as the law may impose upon the public business of the carrier. The purpose of the act is to prevent fraud. It is recited in the preamble that, 'Whereas, numerous frauds have been practiced upon unsuspecting travelers by means of the sale, by unauthorized persons, of railway and other tickets.' The appellant is not in the position of one innocently selling

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an unused portion of a ticket bought in good faith. He is confessedly conducting a business at which the act of assembly directly strikes, and which the legislature has said is prolific of fraudulent results. The appellant is not deprived of any property of which he is honestly the owner, nor is he prevented from prosecuting a business of a kind recognized by the law as respectable. The privileges and immunities protected by the constitution are subject to such restraints as the government may prescribe for the general good of the whole people. The appellant has, therefore, no right to complain of the restriction upon his business, which has been stigmatized as conducive to fraudulent acts and practices. To those not familiar with the evils which have led the legislature of Pennsylvania and other states to pronounce the business of a 'ticket broker' or 'ticket scalper' fraudulent and punishable, the examination of the reports of the interstate commerce commission is interesting and instructive. See 2 Interst. Com. R. (Co-op. Ed.) p. 345; 3 Interst. Com. R. (Co-op. Ed.) p. 363. An excerpt from the last citation may be found in Ray, Pass. Carr. § 138. The facts and figures given are astounding. They are too voluminous to embody here. The impression made on the minds of the commission is evinced by the expressions contained in the annual report for 1890 (page 364). Some of them are as follows: 'In whatever aspect ticket scalping may be viewed, it is fraudulent alike in its conception and in its operations. \* \* \* Fraud, therefore is the incentive to the business. \* \* \* One might suppose that a practice of this character could no more be defended than larceny or forgery, but, strange as it may appear, it is defended before legislative bodies and elsewhere, and the right to carry it on unmolested is demanded.' While to the legislative body may be conceded a large discretion in pronouncing upon the moral character of the acts in respect to which they have legislated, yet is the corroboration of their judgment acceptable from a source created by national authority, with national opportunity and obligation to obtain accurate information. Their reports further show that, the evil appearing great, the commission have on more than one occasion advocated the passage of legislation by congress not differing greatly from the Pennsylvania act, in order that the business of the ticket broker might be stamped out by national authority.

"Finding no error committed by the court below, the judgment is affirmed, and the record is remitted, that the sentence imposed by the court below may be carried out."

The act of May 6, 1863, entitled "An act to prevent fraud upon travelers" (P. L. 582), so far as it relates to the questions involved in this case, is as follows:

"Whereas, numerous frauds have been practiced upon unsuspecting travelers, by means of the sale by unauthorized persons, of railway and other tickets; and also, upon railroads and other corporations, by the fraudulent use of tickets, in viola-

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tion of the contract of their purchase: Now, therefore, with the view of preventing and punishing such frauds:

"Section 1. Be it enacted," etc., "that it shall be the duty of the owner, or owners, of any railroad, steamboat, or other conveyance, for the transportation of passengers, to provide each agent, who may be authorized to sell tickets, or other certificates, entitling the holder to travel upon any railroad, steamboat, or other public conveyance, with a certificate, setting forth the authority of such agent to make such sales; which certificate shall be duly attested, by the corporate seal, if such there be, of the owner of such railroad, steamboat, or other public conveyance; and also by the signatures of the owner, or officer, whose name is signed upon the tickets or coupons, which such agents may sell.

"Sec. 2. That it shall not be lawful for any person, not possessed of such authority, so evidenced, to sell, barter, or transfer, for any consideration whatever, the whole or any part, of any ticket, or tickets, passes, or other evidences of the holder's title, to travel, on any railroad, steamboat, or other public conveyance, whether the same be situated, operated, or owned, within, or without, the limits of this commonwealth.

"Sec. 3. That any person, or persons, violating the provisions of the second section of this act, shall be deemed guilty of misdemeanor, and shall be liable to be punished by a fine, not exceeding five hundred dollars, and by imprisonment, not exceeding one year, or either, or both, in the discretion of the court in which such person, or persons shall be convicted."

Section 4 of the act makes it the duty of every authorized agent to exhibit to any person desiring to purchase a ticket, or to any officer of the law who may request it, a certificate of his authority to sell, and to keep said certificate posted in a conspicuous place in his office. Section 5 makes it a duty of the owners of a railroad, steamboat, and other conveyances to provide for the redemption of the whole or any parts of any ticket or tickets which the purchaser, for any reason, has not used or does not desire to use, at a rate which shall be equal to the difference between the price paid for the whole ticket and the cost of a ticket between the points for which the proportion of said ticket was actually used; prohibits the sale by any person of the unused portion of any ticket otherwise than by the presentation for redemption as provided in this section, provided that this act should not prohibit any person who had purchased a ticket from any agent authorized by the act, with a bona fide intention of traveling upon the same, from selling any part of the same to any other person, if such person travels upon the same. By an act approved April 10, 1872 (P. L. 51), the proviso of the fifth section of the act of 1863 was amended by limiting the right of the person who had purchased a ticket from any agent authorized as provided in the act of 1863, with a bona fide intention of traveling upon the same the whole distance between the points named in the

ticket, to a sale of the unused portion to the company that sold the same.

J. S. & E. G. Ferguson and Joshia Cohen, for appellant.

John C. Haymaker, Dist. Atty., and Clarence Burleigh, for the Commonwealth.

Per Curiam. It was contended by the defendant in the court of quarter sessions and in the superior court that the acts of assembly under which the indictment was framed were in conflict with the provisions of the state and federal constitutions. His contention was defeated in each of the courts, and it is now before the supreme court on appeal. It is a noticeable fact that the act now assailed as unconstitutional and void has stood in full force upon the statute books for nearly 40 years, "and, although frequently before the courts, during all this time, has yet to be stricken down, interfered with, or declared illegal." "It must not be lost sight of that the attitude of courts is not one of hostility to acts whose constitutionality is attacked. On the contrary, all the presumptions are in their favor, as courts are not to be astute in finding or sustaining objections." *In re Sugar Notch Borough*, 192 Pa. St. 355, 43 Atl. 985. "We cannot try the constitutionality of a legislative act by the motives and designs of the lawmakers, however plainly expressed. If the act itself is within the scope of their authority, it must stand, and we are bound to make it stand if it will, upon any intendment. It is its effect, not its purpose, which must determine its validity. nothing but a clear violation of the constitution—a clear usurpation of a power prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void." *Railroad Co. v. Riblet*, 66 Pa. St. 164. In this connection we refer to *Com. v. Wilson*, 14 Phila. 384, and to *Powell v. Com.*, 114 Pa. St. 265, 7 Atl. 913. Other cases of like import might be cited, but it is not deemed necessary to refer to them herein. The quotations from the opinions in the cases first above mentioned plainly show the relations existing between the judicial and legislative departments of the government, and an occasional reference to them has a tendency to maintain those relations, and to define the powers and duties of the parties in their respective departments. It is of the first importance that the parties clothed with powers and duties in the legislative, executive, and judicial departments of the government should exercise the same within their respective spheres, and not beyond them. It is the observance of the distinctions between the several departments which enables the officials in them to exercise their authority and discharge their duties within the sphere to which they are restricted. We have not been able to find in the acts of assembly so vigorously assailed by the defendant and his counsel any provision in conflict with the constitution referred

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to, or any provision in either of said constitutions opposed to anything objectionable in said acts of assembly. The whole subject was carefully considered by the superior court, and the conclusions arrived at were sustained in a satisfactory opinion by Judge Porter, which we unhesitatingly affirm. Judgment affirmed.

## NOTES.

**Constitutionality of "Anti-Ticket Scalper Laws."**—*Illinois*.—Act April 19, 1875, of Illinois which prohibits the sale of railroad or steamboat tickets or parts thereof except by authorized agents of the carrier, but permits one who has purchased a ticket from an authorized agent, with a *bona fide* intention of traveling thereon, to sell it, cannot be held unconstitutional as depriving any person of property without due process of law, or as granting special or exclusive privileges to carriers. *Burdick v. People*, 149 Ill. 600, 36 N. E. Rep. 948, 41 Am. St. Rep. 329, 24 L. R. A. 152; *Id.*, 149 Ill. 611, 36 N. E. Rep. 952, 58 Am. & Eng. R. Cas. 28.

*Indiana*.—The Indiana Law (1 Rev. St. Indiana, 1876, ch. 249), prohibiting general brokerage business in the buying and selling of unused portions of railroad tickets, except under certain well-defined restrictions, is a police regulation, and, whatever may be said either for or against the justice thereof, the legislature in its enactment did not exceed its legitimate power under the state constitution. *Fry v. State*, 63 Ind. 553, 56 Am. & Eng. R. Cas. 230.

*Minnesota*.—Minn. Act of 1893, ch. 66, entitled "An act to regulate the sale and redemption of transportation tickets of common carriers, and to provide punishment for the violation of the same," is not unconstitutional either as class legislation or as granting special privileges to carriers. Neither is the act unconstitutional as a delegation of police power of the state to grant licenses to engage in the business, or as an interference with interstate commerce; nor does the act deprive the citizen of his property without due process of law, at least as to tickets purchased after the passage of the act. *State v. Corbett*, 57 Minn. 345, 59 N. W. Rep. 317, 24 L. R. A. 498.

*Pennsylvania*.—Act May 6, 1863 (P. L. 582), as amended by Act April 10, 1872 (P. L. 51, Purd. Dig. p. 220), prohibiting any person other than an authorized agent of the carrier from selling railroad tickets, and making a violation of the statute a misdemeanor, but providing for the redemption of unused tickets or parts thereof by the carrier cannot be held unconstitutional as depriving any person of property without due process of law, or as abridging the privileges or immunities of any citizen of the United States, or as creating a monopoly in a lawful business. *Commonwealth v. Wilson*, 14 Phila. (Pa.) 384.

**Unconstitutional.**—*New York*.—That portion of the act of 1897 of New York (chapter 506) providing, in substance, that the sale of passage tickets shall be restricted to agents specially authorized in writing to sell tickets by transportation companies, and attempting to make the mere sale of a passage ticket, by a person not authorized by some one of the

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transportation companies, an unlawful act, is in contravention of the provisions of the state constitution declaring, in substance, that no member of the state shall be deprived of liberty, or of any of the rights secured to any citizen thereof, without due process of law. *People ex rel. Tyroler v. Warden of City Prison of City of New York* (N. Y.), 14 Am. & Eng. R. Cas., N. S., 474.

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NORFOLK & W. RY. CO.

v.

OLD DOMINION BAGGAGE CO.

(*Supreme Court of Appeals of Virginia, Jan. 17, 1901.*)

[37 S. E. 784.]

**Stations—Privileges to Local Carriers—Construction of Statute.\*—**Where the legislature adopted an English statute prohibiting carriers from giving undue preferences to particular persons, it will be presumed that the settled construction given to such statute by the English courts was intended to be incorporated in the act, and such construction will govern in the interpretation thereof.

**Same—Same—Same—Injunction.**—Under Acts 1891-92, p. 965, providing that common carriers shall not give preferences to particular persons in any respect, or subject any particular person to prejudice, a baggage transfer company could not restrain a railway company from allowing a rival baggage company to enter its grounds.

Appeal from circuit court of city of Lynchburg.

Injunction and petition for damages by the Old Dominion Baggage Company against the Norfolk & Western Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

F. S. Kirkpatrick, for appellant.

Caskie & Coleman, for appellee.

Harrison, J. The bill in this case was filed by the Old Dominion Baggage Transfer Company, alleging that it was engaged at Lynchburg in the baggage transfer business; that the Lynchburg Baggage Transfer Company was engaged in a rival business at the same place, and that complainant and its rival had both theretofore been allowed to enter the grounds of the appellant attached to the

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\*As to whether carrier is entitled under the common law to grant exclusive privileges at stations to local carriers, see *Boston & A. R. Co. v. Brown* (Mass.), 19 Am. & Eng. R. Cas., N. S., 304, and *note*, 30 *et seq.*



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Union Station for the purpose of soliciting baggage from persons alighting from the trains at that point; that the appellant had since leased to its rival the Lynchburg Baggage Transfer Company the right to solicit incoming baggage at the said station, and had refused to allow complainant to enjoy the same privilege; that, in consequence of being excluded by appellant from its station premises, the private business of complainant had been practically destroyed.

The prayer of the bill is that the Norfolk & Western Railway Company may be restrained from giving, and the Lynchburg Transfer Company from receiving, the undue preference and advantage complained of, and that the appellant may be required to furnish appellee the same or equally as good facilities as are furnished to the Lynchburg Transfer Company in the conduct of its business.

From a decree granting the relief asked by appellee this appeal has been taken.

There is no allegation in the bill that appellee has been prevented or hindered in any way from delivering or receiving baggage at the station for the traveling public employed by it for that purpose, or that the traveling public has in any way been inconvenienced or interfered with at the station in the delivery or removal of baggage for which appellee held checks or orders. The sole ground of complaint is that appellee has been denied by appellant the privilege of using its station for the purpose of soliciting the delivery of baggage from persons arriving upon its trains. The question presented involves the construction of section 3 of an act to regulate carriers, approved March 3, 1892, which appellee insists is violated by the refusal of appellant to allow it the same rights in the matter of soliciting baggage that is extended to the Lynchburg Transfer Company. That act is in the following words:

"It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Acts 1891-92, p. 965.

This law was originally passed by the legislature in 1867 (Acts 1866-67, p. 725), and has been continuously in force until the present time. It was taken from, and is in the words of, section 2 of the English railway and canal traffic act of 1854 (17 & 18 Vict. c. 31). The legislature, having taken from the English act the language used in section 3 of the act approved March 3, 1892, adopted therewith the construction placed upon that language by the English courts. In *Doswell v. Buchanan's Ex'rs*, 3 Leigh, 365, 379, Carr, J., said: "It is admitted that when the construction of an English statute

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has been settled by a series of decisions, and our legislature enacts that statute in totidem verbis, the construction must be considered as adopted along with the statute."

In *Town of Danville v. Pace*, 25 Grat. 1-5, Staples, J., said: "It is not to be supposed that the legislature incorporated into our laws an important statute of another state in ignorance of the interpretation given to it by the courts of that state. It must be presumed, rather, that the legislature, in adopting the precise phraseology, intended to adopt along with it the interpretation also."

In *Mangus v. McClelland*, 93 Va. 786, 22 S. E. 364, Keith, P., said: "It is a familiar rule of construction that when a statute has been construed by the courts, and is then reenacted by the legislature, the construction given to it is presumed to be sanctioned by the legislature, and thenceforth becomes obligatory upon the courts."

This rule of construction has been applied by the supreme court to the same section of the English traffic act now under consideration, from which was also taken the third section of the interstate commerce act.

In *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. Mr. Justice Brown said: "But, so far as relates to the question of 'undue preference,' it may be presumed that congress, in adopting the language of the English act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute."

In view of this settled rule of construction, we must look to the interpretation which had been put upon the English act by the English courts at the time of its adoption by the legislature in 1867, and be guided by those decisions in interpreting the legislation in question.

In the early English case of *Barker v. Railway Co.* (C. B. 1856) 86 E. C. L. 45, the plaintiff sued the railway company for refusing to permit him to drive on its station premises with his omnibus for the purpose of taking persons to the station and bringing others away. All of the judges delivered opinions, holding that the case was not within the English traffic act of 1854 (17 & 18 Vict.), saying that it would be extraordinary if any such right existed in one to whom the company owed no direct duty; that the plaintiff was not a person wishing to travel by the railway, or to send goods by it, but a person who carries to and from the railway persons who are desirous of using or who have used the railway; that the action had neither principle nor any color of authority to sustain it.

In the case of *Beadell v. Railway Co.* (C. B. 1857) 89 E. C. L. 509, the railway company had agreed with a cab proprietor, in consideration of his paying £600 per annum, to allow him the exclusive privilege of plying for hire with flies within the station. Another cab proprietor sought an injunction against the railway company under the English traffic act, but, as

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he failed to allege or prove inconvenience to the public arising from the arrangement, and showed only private damages, an injunction was refused; Williams, J., saying: "The affidavits upon which this motion is founded do not show that the agreement with Clark is not highly beneficial to the public as well as to the company; and it has been expressly laid down in a case which has not been cited—*In re Barret* (C. B. 1857) 87 E. C. L. 423—that the statute in question was passed for the benefit of the public, and not for that of individuals."

In the case of *Painter v. Railway Co.* (C. B. 1857) 89 E. C. L. 701, the railway company had granted exclusive permission to a limited number of fly proprietors to ply for hire within the station. One of the fly proprietors who had been excluded from participation in the arrangement sought an injunction against the company under the English traffic act, which was refused; Creswell, J., saying: "I am of opinion that no ground is presented to justify the interference of the court. Before we put the powers of the act in motion, we must be satisfied that there is some substantial injury or inconvenience to the public, and that the complaint is bona fide made on behalf of the public." Williams, J., said: "The complaint must come from those who use the railway."

These cases had all been decided some years before the adoption of the English act by the legislature in 1867. The construction put by them upon the act has since been repeatedly approved by the English courts. In the recent case of *Station Committee v. Ross* [1897] App. Cas. 479, it was held that a railway company owning a hotel of their own within the limits of the station may qualify their permission to other hotel proprietors and their servants to have free access to the platform with the condition that on those occasions no hotel servant should wear a distinctive badge or livery; Lord McNaghten saying the question seems to be this: "Is the respondent, when not using or desirous of using the railway, entitled as of right by himself or his servants to enter the station? Or, to put the question in simpler form, are the appellants entitled to exclude all persons other than those who use or are desirous of using the railway? \* \* \* It seems to me that the question of law was decided, and decided rightly, forty years ago, by the court of common pleas in the case of *Barker v. Railway Co.*, supra." Thus, as late as 1897, the construction put upon the English act in 1854 is adhered to and approved.

Treating this construction as incorporated into section 3 of the act of 1892 when that act was adopted by the legislature in 1867, it is obvious that the position taken by appellee cannot be maintained.

Inasmuch as the construction put upon the statute in question by the English courts prior to our adoption of its conclusive of the case at bar, we have deemed it unnecessary to cite num-

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erous decisions of the American courts placing the same construction upon statutes similar to our own.

For these reasons the decree appealed from must be reversed, and this court will enter such order as the lower court ought to have entered dismissing appellee's bill, with costs.

~~Same-Same-  
Same-Injunction.~~

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ST. LOUIS, I. M. & S. RY. CO.

v.

LEWIS.

(*Supreme Court of Arkansas, Feb. 16, 1901.*)

[61 S. W. 163.]

**Failure of Passenger to Alight at Station—Ejection beyond Station—Statutory Liability.**—Sand. & H. Dig. § 6172, forbids railroad companies to eject passengers for refusal to pay fare at places other than stations. Plaintiff was ejected from defendant's train, a quarter of a mile beyond her designated station, because of her failure to alight at the station after an ample stop had been made. *Held*, that it was error to charge that defendant was liable for putting plaintiff off at a place other than a station, since the statute applies only to the ejection of passengers for the nonpayment of fares.

**Same—Same—Same.**—In an action for putting plaintiff off a quarter of a mile beyond her destination, an instruction that, if defendant caused plaintiff to leave the train at a place other than a station, the jury should find for plaintiff, though the train stopped at the station a sufficient time to permit plaintiff to leave the train, was erroneous, since, in case of her failure to alight when she had an opportunity to do so, defendant would have a right to put her off without taking her back to the station.

Appeal for circuit court, Faulkner county; George M. Chapline, Judge.

Action by Theresa Lewis against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. *Reversed*.

This action was brought by Theresa Lewis against the St. Louis, Iron Mountain & Southern Railway Company. Plaintiff alleged in her complaint that she was, on the 9th day of June, 1898, a passenger on one of defendant's trains, which was going from Little Rock to Palarm, a station on its road; that on the arrival of the train at Palarm the defendant wrongfully and negligently failed to permit her to get off, but carried her past the station for a distance of one-half mile, and there wrongfully, forcibly, and violently ejected her; that the place

where she was put off was not a regular station or stopping place; that in putting her off the conductor was rude, coarse, rough, and oppressive; that he laid his hands forcibly upon her, and pushed and threw her from the train, to her great injury; that she was "greatly mortified and humiliated, greatly hurt in body, greatly agonized in mind, and was forced, on a hot and sultry day, to walk and carry her baggage back to the station of Palarm"; and she asked for judgment for \$3,000.

The defendant answered, and denied all the allegations made in the complaint.

The issues joined were tried by a jury. In the trial the plaintiff testified, substantially, as follows: On the morning of June 9, 1898, a hot, clear summer day, she with her daughter, a girl about 11 years old, several bundles, and two valises, boarded defendant's train at Little Rock for the station of Palarm, 28 miles away. In due time the train arrived at Palarm, but failed to stop, and she failed to get off. The bell cord was pulled by some one, and the train stopped about a quarter of a mile from the station. The conductor came to her, and asked why she did not get off, and she replied that he did not give her time. The conductor then said, "Get off." She asked if they were going back to the station with her. He said, "No; get off here." He then caught her roughly, and said, "Get off right here." He placed his hands on her shoulder, and hurt her. She was shocked and humiliated. She walked to the door, and alighted at a place "just like it was at the depot." She walked to the depot, and from there to the Arkansas river, a distance of three-quarters of a mile, and from there she was taken home in a buggy. She was compelled to stop to rest three of four times on her way to the river. When she reached home she went to bed, "and was laid up for a week or more."

Many witnesses testified that the train stopped at Palarm a sufficient length of time for plaintiff and other passengers to get off, and there was evidence adduced tending to show that she was not mistreated, insulted, or injured by any one on the train.

Among many instructions given, the court instructed the jury, over the objections of the defendant, as follows:

"If you believe from the evidence that plaintiff entered the passenger train of defendant at Little Rock, and paid her fare to Palarm, a station on defendant's line of railroad, then defendant could not put plaintiff off the train at a place other than a station where passengers are accustomed to get on and off trains of defendant; and, if defendant caused plaintiff to leave the train at a place other than the station where passengers are accustomed to get on and off defendant's trains, then you will find for plaintiff, no matter whether the train was stopped at the station a sufficient time to have permitted plaintiff to have left the train or not.

"If you find for the plaintiff, then you will assess her dam-

ages at such as will fairly compensate her for all injury received by her, for physical pain and suffering, and for any insult or rudeness that may have been offered to her by the conductor or other agent of the defendant. And if you further find that defendant did not stop its train at a standstill at the station to permit plaintiff to leave the car in safety, and she was carried past the station, and compelled to leave the car, at a place other than the station, then, in fixing the amount of damages, you may take into consideration also the lacerated feelings and wounded sensibilities and shock of mind that plaintiff may have suffered, if you find from the evidence she suffered any therefrom.

"And the court cannot instruct you in dollars and cents as to the amount of damages, if you should find for the plaintiff, but the amount is left to the fair determination of the jury."

The jury returned a verdict in favor of the plaintiff for \$400, and the defendant appealed.

Oscar L. Miles and Dodge & Johnson, for appellant.

J. H. Harrod and Sam Frauenthal, for appellee.

Battle, J. In telling the jury that, if the appellant paid her fare to Palarm, the "defendant could not put her off the train at a place other than a station where passengers are accustomed to get on and off trains of defendant," the circuit court committed an error. It is only in cases where a passenger refuses to pay fare the statutes require a railroad company to put him off the train at a usual stopping place. Sand. & H. Dig. § 6172. Beyond this the common-law right to put him off, without reference to stations, is left unimpaired. Hobbs v. Railway Co., 49 Ark. 357, 5 S. W. 586. In this case the passenger (appellee) was not put off because she had failed to pay fare. She paid her fare, and was put off a short distance beyond her destination, because she failed to get off at that place. She did not want to travel further, but asked if she could not be taken back to Palarm. There was no demand for additional fare and refusal to pay it.

The latter part of the instruction, in which the court told the jury that, "if defendant caused plaintiff to leave the train at a place other than the station where passengers are accustomed to get on and off defendant's trains, then you will find for plaintiff, no matter whether the train was stopped at the station a sufficient time to have permitted plaintiff to have left the train or not," is also erroneous. If the train was stopped at the station of Palarm a sufficient length of time for appellee to get off, and she failed to do so, then the appellant was guilty of no wrong in stopping where it did, and in a respectful manner causing her to leave the train. In doing so, it was in the exercise of its right, and was not liable for damages. It was not bound to take her back to the station of Palarm for the purpose of giving her another opportunity to

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leave the train. For the purpose of avoiding collisions, and of orderly and regular transportation, and of serving the public to the best advantage, trains should run on schedule time. The conveying passengers back to stations at which they should have left the train and failed to get off may, in some instances, defeat this purpose, and lead to disastrous consequences. A rule or regulation requiring railroad companies to do so would not only be unjust, but would be unwise, and against the interest of the public.

Much is said in appellant's brief about the right to recover damages on account of mental anguish, distress, or suffering which was not the result of a physical injury. The court has expressed its opinion upon this subject in *Peay v. Telegraph Co.*, 64 Ark. 533, 43 S. W. 965, 39 L. R. A. 463; *Railroad Co. v. Deloney*, 65 Ark. 177, 45 S. W. 351; and *Railway Co. v. Anderson*, 67 Ark. 123, 129, 53 S. W. 673. We deem it unnecessary to add to what we have already said.

Reversed, and remanded for a new trial.

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**BENIGNIA**

*v.*

**PENNSYLVANIA R. Co.**

*(Supreme Court of Pennsylvania, Oct. 22, 1900.)*

[58 Atl. Rep. 359.]

**Injury to Employee—Negligence of Fellow Servant—Liability.\*—**Where several persons are employed as workmen in the same general service, though in different parts or departments of it, or though one may be in an inferior position to the other, and one of them is injured by the carelessness of another, the employer is not responsible, unless on the ground of negligence in employing an unfit person for his service. And this rule is applicable in an action against a railroad for injuries sustained by a laborer on its construction train run into by its freight train, whether the collision resulted from the negligence of a flagman connected with the construction train, or that of the engineer of the other train.

Appeal from court of common pleas, Cambria county.

Action by Marotte Benignia against the Pennsylvania Railroad Company for injury received by plaintiff while employed as a laborer on a construction train run into by a freight train through the negligence of a flagman connected with the construction train, or of the engineer of the freight train. Judge-

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\*See notes at end of case.

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ment for defendant on a compulsory nonsuit, and plaintiff appeals. Affirmed.

The opinion of the lower court reads as follows:

"Nothing has been adduced on the argument of the above motion that convinces us there was error in sustaining the motion for a compulsory nonsuit made at the time of the trial. There is nothing in the case to distinguish it from many others of the same kind in which an employee is injured by the negligence of a fellow employee, excepting that this case is free from doubt on the main question. The burden of proving that his injury resulted from the negligence of the defendant was on the plaintiff. *Railroad Co. v. Smith*, 125 Pa. St. 259, 17 Atl. 443, and cases there cited. If there was any proof of negligence on the part of any one in this case, it is so clear as to permit of no discussion that it was on the part of some one engaged in a common employment with him, and, therefore, under all the decisions in this state and elsewhere, the employer cannot be held responsible. Whatever the law may be in other states, either under the decisions or statutes, the law of this state has been well settled, and cannot be now questioned, that where several persons are employed as workmen in the same general service, though in different parts or departments of it, or though one may be in an inferior position to the other, and one of them is injured by the carelessness of another, the employer is not responsible, unless he has employed unfit persons for his service. *Ryan v. Railroad Co.*, 23 Pa. St. 384; *Caldwell v. Brown*, 53 Pa. St. 453; *O'Donnell v. Railroad Co.*, 59 Pa. St. 246. 'The rule rests upon the sound principles that each one who enters upon the service of another takes on himself the ordinary risk of the employment in which he is engaged, and the negligent acts of his fellow workmen, in the general course of his employment, are within the ordinary risks.' *Coal Co. v. Jones*, 86 Pa. St. 432; *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514. When the plaintiff accepted employment from the defendant, involving his transportation from place to place, injury by the negligence of any employee connected with the transportation of trains over the same road was clearly within the risks ordinarily incident to the service undertaken."

Donald E. Dufton and Francis P. Martin, for appellant.

Alvin Evans and H. W. Storey, for appellee.

Per Curiam. At the close of the plaintiff's evidence in this case, the defendant's counsel moved for and obtained a compulsory nonsuit, on which the plaintiff's counsel moved the court to take it off. Upon due consideration of the plaintiff's motion, the court refused to take off the nonsuit, and an appeal was taken to this court. On a careful examination of the evidence submitted by the plaintiff, we are convinced that he failed to establish his claim against the defendant, and that



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the court committed no error in granting the nonsuit, or in refusing to take it off. We therefore rest our affirmance of the nonsuit on the opinion of the learned court below overruling the motion to strike it off. Judgment affirmed.

## NOTES.

**WHETHER EMPLOYEES OF DIFFERENT TRAINS ARE FELLOW SERVANTS.**

**Held to Be Fellow Servants.**—According to the weight of authority, even in jurisdictions where the different department limitation is recognized, the fact that employees belong to different trains does not prevent them from being fellow servants.

*United States.*—*Baltimore & O. R. Co. v. Andrews*, 53 Am. & Eng. R. Cas. 523, 50 Fed. Rep. 728, 27 Ohio L. J. 396, 1 C. C. A. 636; *Baltimore Trust, etc., Co. v. Atlanta Traction Co.*, 69 Fed. Rep. 358; *Northern Pac. R. Co. v. Charles*, 162 U. S. 359; *Northern Pac. R. Co. v. Mase*, 63 Fed. Rep. 114, 27 U. S. App. 238; *Northern Pac. R. Co. v. Poirier*, 167 U. S. 48; *Oakes v. Mase*, 165 U. S. 363; *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 15 Am. & Eng. R. Cas. 243, 3 Sup. Ct. Rep. 322; *St. Louis, etc., R. Co. v. Needham*, 63 Fed. Rep. 107, 27 U. S. App. 227; *Thom v. Pittard*, 8 U. S. App. 597, 62 Fed. Rep. 232; *Wright v. Southern R. Co.*, 80 Fed. Rep. 260; *Van Avery v. Union Pac. R. Co.*, 35 Fed. Rep. 40.

*Colorado.*—*Denver, etc., R. Co. v. Sipes*, 23 Colo. 226; *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484, 20 Am. Ry. Rep. 359.

*Illinois.*—*Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302; *Ohio & M. R. Co. v. Robb*, 36 Ill. App. 627; *O'Leary v. Wabash R. Co.*, 52 Ill. App. 641; *Terre Haute, etc., R. Co. v. Leeper*, 60 Ill. App. 194.

*Indiana.*—*Evansville, etc., R. Co. v. Tohill*, 143 Ind. 49.

*Massachusetts.*—*Peaslee v. Fitchburg R. Co.*, 152 Mass. 155.

*Michigan.*—*Enright v. Toledo, etc., R. Co.*, 93 Mich. 409; *Jarman v. Chicago, etc., R. Co.*, 98 Mich. 135.

*Mississippi.*—*Chicago, St. L. & N. O. R. Co. v. Doyle*, 8 Am. & Eng. R. Cas. 171, 60 Miss. 977; *McMaster v. Illinois C. R. Co.*, 41 Am. & Eng. R. Cas. 486, 65 Miss. 264, 7 Am. St. Rep. 653, 4 So. Rep. 59.

*Missouri.*—*Relyea v. Kansas City, etc., R. Co.*, 112 Mo. 86, 53 Am. & Eng. R. Cas. 578, 19 S. W. Rep. 1116; *Schaub v. Hannibal, etc., R. Co.*, 106 Mo. 74.

*New Mexico.*—*Atchison, etc., R. Co. v. Martin*, 7 N. Mex. 158.

*New York.*—*Carr v. North River Constr. Co.*, 48 Hun (N. Y.) 266; *Herrington v. Lake Shore, etc., R. Co.*, 83 Hun (N. Y.) 365.

*Ohio.*—*Pittsburg, Ft. W. & C. R. Co. v. Devinney*, 17 Ohio St. 197; *Whaalan v. Mad River & L. E. R. Co.*, 8 Ohio St. 249.

*Oregon.*—*Guthrie v. Southern Pac. R. Co. (Ore.)*, 26 Pac. Rep. 76; *Miller v. Southern Pac. Co.*, 20 Ore. 285.

*Pennsylvania.*—*Cole v. Northern Cent. R. Co.*, 12 Pa. Co. Ct. Rep. 573.

*South Carolina.*—*Jenkins v. Richmond, etc., R. Co.*, 39 S. Car. 507, 39 Am. St. Rep. 750; *Murray v. South Carolina R. Co.*, 1 McMull (S. Car.) 385, 36 Am. Dec. 268.

*Texas.*—*Corona v. Galveston, etc., R. Co. (Tex.)*, 17 S. W. Rep. 384.

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*Virginia*.—Darracott v. Chesapeake & O. R. Co., 83 Va. 288, 2 S. E. Rep. 511; Norfolk & W. R. Co. v. Donnelly, 53 Am. & Eng. R. Cas. 571, 88 Va. 853, 14 S. E. Rep. 692; Norfolk, etc., R. Co. v. Houchins, 95 Va. 398; Norfolk, etc., R. Co. v. Lindamood (Va.), 14 S. E. Rep. 694.

*England*.—Hutchinson v. York, N. & B. R. Co., 5 Ex. 343, 6 Railw. Cas. 580, 19 L. J. Ex. 296.

**Same—Brakeman and Engineer.**—A brakeman, working a switch for his train on one track in a railroad yard, is a fellow servant with the engineman of another train of the same corporation upon an adjacent track, and cannot maintain an action against the corporation for an injury caused by the negligence of the engineman in driving his engine too fast, and not giving due notice of its approach, without proving negligence of the corporation in the employing an unfit engineman. Randall v. Baltimore & O. R. Co., 15 Am. & Eng. R. Cas. 244, 109 U. S. 478.

Engineers and brakemen are held to be in the same class or line of service; and the fact that the engineer served on a passenger and the brakeman on a freight train does not affect the reason and policy of implying, as between themselves, such association, knowledge, and trust as to have induced an undertaking mutually to risk all the contingencies which the ordinary skill and care of each other in his line of service could not avert. Louisville & N. R. Co. v. Robinson, 4 Bush (Ky.) 507.

An engineer on a moving passenger train, and a brakeman on a freight train of the same company, at a depot, who is ordered by the conductor of his train to go along the line of the road to display danger signals to the passenger train, are fellow servants for the purpose of bringing the train safely into the depot. East Tenn., V. & G. R. Co. v. Rush, 15 Lea (Tenn.) 145.

**Same—Brakeman and Trainmen of Other Train.**—The brakeman of a freight train is the fellow servant of the conductor, and other employees in charge of and operating a passenger train of the same company, and cannot recover for injuries caused by the negligence of the train hands on the passenger train. McMaster v. Illinois C. R. Co., 41 Am. & Eng. R. Cas. 486, 65 Miss. 264, 7 Am. St. Rep. 653, 4 So. Rep. 59.

**Same—Brakeman of Freight Train Acting as Switchman and Engineer of Passenger Train.**—Where the brakeman of a freight train is, *pro hac vice*, in the usual discharge of his duties as the switchman for the passing trains, his negligence in improperly turning the switch for the passage of a passenger train, whereby its engineer is injured, is the negligence of a fellow servant. Swisher v. Illinois Cent. R. Co. (Ill.), 16 Am. & Eng. R. Cas., N. S., 421.

**Same—Conductor of Construction Train and Fireman of Passenger Train.**—A conductor of a construction train left open a switch which, under a rule of the company, it was his duty to attend to in person, and a fireman of a passenger train was injured in consequence. Held, that there could be no recovery, as the negligence was that of the fireman's fellow servant. St. Louis, I. M. & S. R. Co. v. Needham (11 C. C. A. 56), 27 U. S. App. 227, 25 L. R. A. 833, 63 Fed. Rep. 107.

**Same—Conductor and Brakeman.**—The conductor is a fellow servant of a brakeman on another train. Baltimore & O. R. Co. v. Andrews,

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53 Am. & Eng. R. Cas. 523, 50 Fed. Rep. 728, 1 C. C. A. 636; *Becker v. Baltimore & O. R. Co.*, 57 Fed. Rep. 188; *Kerlin v. Chicago, P. & St. L. R. Co.*, 50 Fed. Rep. 185; *Pittsburg, Ft. W. & C. R. Co. v. Devinney*, 17 Ohio St. 197; *Hutchinson v. York, N. & B. R. Co.*, 5 Ex. 343.

**Same—Engineers.**—A., an engineer in the employ of a railroad company, was in charge of a train proceeding southward. Several trains being not on time the train dispatcher at a point to the north ordered train No. 6, southward bound, to "get orders at Grand Junction." On arriving at Grand Junction the engineer of No. 6 found no orders awaiting him and so proceeded to the south. While so doing he collided with the train upon which A. was engineer and A. was in consequence killed. Suit being brought by A.'s widow against the railroad company to recover damages for her husband's death, *held*, that the same had been occasioned by the negligence of a fellow servant of deceased, and that therefore plaintiff was not entitled to recover. *Chicago, St. Louis & N. O. R. Co. v. Doyle*, 8 Am. & Eng. R. Cas. 171, 60 Miss. 977.

**Same—Engineer and Fireman.**—A fireman on a passenger train, and an engineer in charge of an engine not connected with such train, but belonging to the same railroad company, are fellow servants, and where the fireman is killed by a collision between the engine and the train caused by the negligence of the engineer the company will not be liable. *Howard v. Denver & Rio Grande R. Co.*, 24 Am. & Eng. R. Cas. 448, 26 Fed. Rep. 448.

**Same—Wreckers and Trainmen of Other Train.**—Where a crew of wreckers board a train for the purpose of going to the scene of a wreck, and are injured by a collision with another train, although they are not at work at the time of the injury, they are held to be fellow servants with the engineers of the two trains and cannot recover for injuries sustained by reason of the collision, caused by the negligent conduct of the engineers. *Abend v. Terre Haute & Indianapolis Ry. Co.*, 17 Am. & Eng. R. Cas. 614, 111 Ill. 202.

**Not Fellow Servants.**—But in some cases, either on account of the different department limitation being recognized or because of difference in grade, employees of different trains have been held not to be fellow servants.

**Same—Conductor and Brakeman.**—When a conductor in charge of a train, with a right to command and to control its movements, leaves his engine and train standing on the track of the main line, along which a train due and expected by him has a right at that time to pass, and fails to use ordinary care to warn or notify in any way the expected train of such obstruction in its way, whereby a collision takes place, and a brakeman on the coming train is injured, and such negligence of the conductor is the direct and proximate cause of such injury, such brakeman, being without fault or the means of preventing such negligence, or of avoiding its consequences, is not the fellow servant of the conductor, and the company will be held responsible for the injury to the brakeman, caused by the negligence of the conductor in such manner. *Daniel v. Chesapeake & O. R. Co.*, 53 Am. & Eng. R. Cas. 503, 36 W. Va. 397, 16 L. R. A. 383, 15 S. E. Rep. 162; *Collins v. St. Paul & S. C. R. Co.*, 30 Minn. 31.

The conductor of a freight train cut the train in two while on a grade, and left a part of the train, on which a brakeman was asleep, without

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seeing that the brakes were set, and it ran down the grade and collided with another train, killing a brakeman thereon. *Held*, that the company was liable for the negligence of the conductor. *Au v. New York, L. E. & W. R. Co.*, 29 Fed. Rep. 72.

**Same—Conductor of Wild Train and Laborer on Gravel Train.**—Where a laborer on a gravel train was injured by a collision with a wild train which failed to obey orders to flag the gravel train, and could not be readily stopped owing to a defect in its engine—*held*, that the conductor and engineer of the wild train were not fellow servants of the workmen on the gravel train, or engaged in the same common employment. *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599, 21 Pac. Rep. 32; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377; *Parker v. Hannibal & St. J. R. Co.*, 109 Mo. 362; *Pike v. Chicago & A. R. Co.*, 41 Fed. Rep. 95.

**Same—Conductor and Fireman.**—A fireman can recover from the company for an injury caused by the negligence of the conductor of another train by reason of which the trains collide. *Ragdale v. Northern Pac. R. Co.*, 42 Fed. Rep. 383.

**Same—Engineer and Conductor.**—Where an engineer upon one train of a railroad company is injured by the negligence of the conductor of another train of the company running in an opposite direction, or by the fault of one of the company's telegraphic operators in transmitting a telegraphic order to such conductor, such engineer being wholly without fault or the means of preventing such negligence or of avoiding its consequences; such engineer is not the fellow servant of said conductor, nor is he the fellow servant of said operator in regard to acts and telegraphic orders between the operator and said conductor within the rule, which exempts the company from liability for the negligent acts of fellow servants or persons engaged in the common service, and the company will be held responsible for an injury to such engineer, caused by the negligence of such conductor or operator in such manner. *Madden v. Railway Co.*, 28 W. Va. 610, 57 Am. Rep. 695.

**Same—Engineer and Those in Charge of Other Train.**—An engineer of a passenger train injured in a collision resulting from the negligence of those in charge of a freight train in not running it on time may recover against their common employer, as the negligence was not that of his fellow servants. *Kentucky Cent. Ry. Co. v. Ashley*, 87 Ky. 278, 12 Am. St. Rep. 480.

**Same—Expressman and Baggage-man of Passenger Train and Employees of Freight Train.**—One who acts as expressman and baggage-man on a passenger train is not a fellow servant with employees on a freight train. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 34 Fed. Rep. 616.

**Whether Trainmen and Other Employees Riding on the Train Are Fellow Servants.**—See *Rayley v. Garbutt et al.* (Ga.), *ante*, and *note*.

**Criterion of Fellow Service.**—See *Norfolk & W. R. Co. v. Houchins' Adm'r* (Va.), 8 Am. & Eng. R. Cas., N. S., 616, and *note* by Mr. McKinney, 630.

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## DE FORGE

v.

NEW YORK, N. H. &amp; H. R. R.

*(Supreme Judicial Court of Massachusetts, Hampden, Feb. 28, 1901.)*

[59 N. E. 669.]

**Injury to Employee—Notice to Railroad—Statute.**—A notice of an injury to a brakeman, given to a freight agent or to the attorney of his employer, which had made no objection to the receipt of like notices for five years, is a sufficient compliance with St. 1887, c. 270, § 3, requiring notice or an injury sued for to be "given to the employer."

**Same—Evidence—X-ray Pictures.\***—On an issue as to the extent of an injury to a brakeman's left foot he put in evidence X-ray pictures of both feet, printed from a glass plate, each marked in lead pencil "left" and "right"; and a witness then testified to the extent of the injury, based on an enlargement of the bone of the foot as shown by the picture marked "left" and which he intimated was the result of a fracture not disclosed to the naked eye. In opposition thereto the company offered to show that the X-ray placed the right foot on the right side of the plate and the left foot on the left side, and that in printing sensitized paper the objects would be reversed, and that in fact the picture showing an enlargement was a picture of the right foot. It had offered in evidence the plate from which plaintiff's pictures were taken, and which was produced by the photographer who made them, and subsequently other pictures from the same plate were offered. The plate had on it the letters R and L, which had been put on since plaintiff's pictures were printed, but they did not obscure the portion of the left foot in controversy. *Held*, that it was error to exclude this evidence.

**Same—Same—Photographs—Discretion of Court.†**—Discretion of the court in admitting in evidence pictures or photographs of objects in controversy relates solely to their verification or authentication.

**Same—Same—Same—Authentication.**—An X-ray picture of an object in controversy offered in evidence by defendant had been taken by a physician of high standing, who testified that he had taken about a hundred such pictures, and had seen the majority of them developed, and the plate from which the pictures were made was produced by the photographer who had made X-ray pictures therefrom admitted in evidence in plaintiff's favor. *Held*, that neither the plate nor the pictures made by the physician could be excluded as not duly verified.

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\*As to the admissibility of X-ray photographs as evidence in actions for personal injuries, see Chicago, etc., Ry. Co. (Wis.), 16 Am. & Eng. R. Cas., N. S., 476, and *note*, 508.

†As to the admissibility of photographs of injured persons as evidence, see Boston v. Chicago, etc., Ry. Co. (Wis.), 16 Am. & Eng. R. Cas., N. S., 476, and *note*, 507 *et seq.*

De Forge v. New York, N. H. & H. R. R

Exceptions from superior court, Hampden county; Elisha B. Maynard, Judge.

Action for personal injuries by Alfred De Forge against the New York, New Haven & Hartford Railroad. There was a judgment for plaintiff, and defendant brings exceptions. Sustained.

J. B. Carroll and W. M. McClintock, for plaintiff.

Walter S. Robinson, for defendant.

Lathrop, J. The first question in this case is whether the notice required by St. 1887, c. 270, § 3, was given to the defendant. The statute requires that it is be "given to the employer." The person to whom the notice was given was the freight agent of the defendant in Springfield. He testified that he sent it to William E. Barnett, the attorney for the defendant in New Haven; that he so sent it in pursuance of general printed instructions directing him to send such notices as pertained to Barnett's department, and that he had received such notices for five years. We do not think it necessary to determine whether it would have been enough to show merely a notice given to a freight agent or to an attorney of the defendant, but when it appeared that the practice of giving notices in this way had been going on for so long a time without, so far as appears, any objection being made, it might well be found that the defendant had recognized and acquiesced in the practice. See McCabe v. City of Cambridge, 134 Mass. 484; Shea v. Railroad Co., 173 Mass. 177, 53 N. E. 396. This exception is therefore overruled.

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ployee—Notice  
to Railroad—  
Statute.

The remaining question relates to the exclusion of evidence offered by the defendant. As a result of the accident the plaintiff's left foot was injured, and the principal inquiry at the trial was as to the extent of the injury. The plaintiff put in evidence X-ray pictures of the plaintiff's two feet, printed from a glass plate. Each of the pictures was marked under the toes of each foot "left" and "right," respectively, both words being in lead pencil. One of the plaintiff's witnesses explained that the representation of the foot with the word "left" below it was the left foot, and represented the injured foot; and the other, marked "right," was the right foot. He then testified that there had been a dislocation of the bones upward, and that an enlargement of the bone of the foot marked "left" in the picture was, in his opinion, the result of fracture, and that the man would always have a weak foot, and would not be able to perform the duties of a freight brakeman. On cross-examination he testified that, leaving out the question of fracture, there was no reason why the plaintiff could not have a perfectly useful foot; and that, leaving the pictures out, there was nothing to the eye to disclose

Same—Evidence  
—X-ray Pictures.

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any fractures, although he had suspicions as to a fracture. The defendant contended, and offered to show, that the X-ray placed the right foot upon the right side of the plate, and the left foot upon the left side of the plate, and that in printing sensitized paper the objects would be reversed; and that, as matter of fact, the pictures showing an enlargement were pictures of the right foot, instead of the left. This evidence was excluded. Immediately before this the defendant had offered the glass plate from which the plaintiff's pictures were taken, and this was excluded. Subsequently other pictures printed from the same plate were offered in evidence, and were excluded. No reason appears in the exceptions why the evidence offered by the defendant was excluded, and we can see no reason why the plate from which the pictures put in evidence by the plaintiff were printed should not have been admitted. It was produced by the photographer who made the pictures. The ground urged by the plaintiff against its admission was that it had on it the letters "R" and "L," which had been put on since the pictures put in evidence by the plaintiff had been printed. These letters did not in any way obscure the portion of the left foot in controversy, and were certainly no more objectionable than the letters added in pencil to the plaintiff's pictures.

It is further contended by the plaintiff that there was some doubt as to the manner in which the plate was made, and that the judge might have excluded it for that reason. We see nothing in the exceptions to substantiate this claim. If it were true, then the plaintiff's pictures should not have been admitted. It is entirely clear from the testimony that the picture on the glass plate was not taken by a lens, but by an X-ray machine; and that it was the impression of a shadow, not a reflection of an object; the plate being below the feet, and the light above them. When pictures were printed from the plate, the position of the feet would be reversed; and this would have been demonstrated had the plate and the pictures taken by the defendant been admitted. The plaintiff assumed from his marking on the pictures admitted that the feet as represented on the plate were reversed, which is not in accordance with the testimony given by his own witnesses as to the manner in which the impressions on the plate were produced.

Lastly, it is asserted that the judge might have excluded, in his discretion, the plate and the pictures offered by the defendant. The rule is thus stated by Chief Justice Gray in *Blair v.*

Same—Same—  
Photographs—  
Discretion of  
Court.

*Pelham*, 118 Mass. 420: "A plan or picture, whether made by the hand of man or by photography, is admissible in evidence if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case. Whether it is sufficiently verified is a preliminary question of fact, to be decided by the judge presiding at the trial, and not open

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to exception." It is, therefore, in the matter of verification or authentication that the judge has discretion. But here there was no question of this sort. The plaintiff had put in two pictures printed from the glass plate. The defendant then offered the plate, together with two other pictures made from the same plate; and the evidence of verification was stronger in the case of defendant's pictures than in the case of the plaintiff's. The photographer who took the plaintiff's pictures testified that he did not know much about the X-ray; while the person who took the pictures for the defendant was a physician of high standing, who had taken, as he testified, in the neighborhood of a hundred X-ray pictures, and had seen the majority of them developed. On this evidence we do not deem it possible that the judge could have excluded the plate or the pictures on the ground that they were not duly verified. While a picture produced by an X-ray cannot be verified as a true representation of the subject in the same way that a picture made by a camera can be, yet it should be admitted if properly taken. *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445. The rule laid down by Chief Justice Gray in *Blair v. Pelham* is in accordance with earlier and later cases in our reports. *Hollenbeck v. Rowley*, 8 Allen, 473; *Marcy v. Barnes*, 16 Gray, 161, 163; *Randall v. Chase*, 133 Mass. 210, 213; *Turner v. Railroad Co.*, 158 Mass. 261, 265, 33 N. E. 520; *Com. v. Morgan*, 159 Mass. 375, 34 N. E. 458; *Farrell v. Weitz*, 160 Mass. 288, 35 N. E. 783; *Van Houten v. Morse*, 162 Mass. 414, 422, 38 N. E. 705, 26 L. R. A. 430. It is true that the opinion in *Gilbert v. Railway Co.*, 160 Mass. 403, 36 N. E. 60, after stating many reasons why the photograph offered in evidence in that case was properly rejected, concludes in these words, "We think, at least, it was in the discretion of the court to reject it;" citing *Farrell v. Weitz*, *ubi supra*. But the case cited was not decided on the ground that the judge had discretion except on the matter of verification, and we do not think that the court intended to lay down a broader rule than that stated in *Blair v. Pelham*. It is also true that in some cases a somewhat broader rule is laid down. See *Verran v. Baird*, 150 Mass. 141, 22 N. E. 630; *Harris v. City of Quincy*, 171 Mass. 472, 50 N. E. 1042; *Carey v. Inhabitants of Hubbardston*, 172 Mass. 106, 51 N. E. 521. An examination of the papers in these cases leaves no doubt in our minds that the cases were properly decided, whether the reasons given were in accordance with the rule laid down in *Blair v. Pelham* or not. In *Beals v. Inhabitants of Brookline*, 174 Mass. 1, 54 N. E. 339, where photographs were admitted, it was said: "In the admission of such evidence much must be left to the discretion of the presiding justice, and we are not prepared to say that there was error in law in permitting them to be shown to the jury." But in this, as in other matters which may be left generally to the discretion



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of the trial judge, his discretion is not unlimited, and the judge is not at liberty to disregard the rules of law by which the rights of the parties are governed. See *Woodward v. Leavitt*, 107 Mass. 453, 460; *Chandler v. Aqueduct*, 122 Mass. 305. We are of opinion that the rights of the defendant in this case were violated, and that the glass plate, the pictures taken by the defendant, and the evidence offered by the defendant and excluded should have been admitted. It was clearly competent for the defendant to introduce evidence to show that the plaintiff's pictures showing an enlargement of one of the feet, and from which a witness for the plaintiff discovered a fracture, did not represent the left foot, but the right, and for this purpose to show the difference between an ordinary photograph and one taken by an X-ray.

As the only exception relating to the question of liability has been overruled, the new trial will be on the question of damages only. So ordered.

## KANSAS CITY &amp; N. C. R. Co.

v.

## SHOEMAKER.

*(Supreme Court of Missouri, Division No. 2, Feb. 26, 1901.)*

[61 S. W. 205.]

**Right of Way—Condemnation—Damages—Charge—Request.\***—In proceedings to condemn a railroad right of way through defendant's farm, there was evidence to prove the facts on which the instructions were predicated, and the court, at defendant's request, charged that in estimating the damages the jury should consider the amount and value of the land taken, the size and shape of the two tracts into which the farm was thereby divided, the inconvenience resulting from the location of the railroad, and allow defendant such sums as will reasonably compensate him for the injury sustained. *Held*, that giving such charge was not error, where, at plaintiff's request, the court charged in detail as to matters which could not be considered, and correctly defined the term "market value."

**Same—Same—Same—Same—Same.**—Where, in proceedings to condemn a railroad right of way through a farm, the jury are correctly instructed as to the meaning of "market value," and also in detail as to the matters which may and may not be considered in estimating the compensation to be awarded, the charge is not erroneous for failure to expressly state that the damage is the difference between the market value of the farm before and after the appropriation, where no request for such instruction was made.

\*As to whether injury to the land not taken is an element of damages to be considered in condemnation proceedings, see *Union Terminal R. Co. v. Peet Bros. Mfg. Co.* (Kan.), 13 Am. & Eng. R. Cas., N. S., 851, and *note*, 851 *et seq.*

Kansas City, etc., R. Co. v. Shoemaker

Appeal from circuit court, Clay county; E. J. Broadbuss, Judge.

Proceedings instituted by the Kansas City & Northern Connecting Railroad Company to condemn a right of way through the lands of Peter B. Shoemaker. From a judgment entered after trial on exceptions to the report of the commissioners, the plaintiff appeals. Affirmed.

Lathrop, Morrow, Fox & Moore and J. P. Gilmore, for appellant.

Sandusky & Sandusky, for respondent.

Gantt, J. On October 14, 1897, the plaintiff railroad company instituted a condemnation proceeding in the circuit court of Clinton county to condemn a right of way about three-fourths of a mile in length, and containing 933 acres, through the farm of defendant, Shoemaker. Commissioners were appointed, damages assessed, and exceptions duly filed. Upon proper application, a change of venue was awarded to Clay county. At the March term, 1898, a jury trial was had, and the defendant's damages caused by the appropriation were assessed at \$2,500. This appeal is from the judgment entered upon that verdict in the Clay circuit court.

There is but one assignment of error, and that relates to the sufficiency of the first instruction given by the court for the defendant. In order, however, that the sufficiency of that instruction may be properly tested, we deem it proper that the whole series should be considered with it, and the evidence in substance. The plaintiff, in its abstract of the record, says: "To sustain the issues on behalf of both defendant and plaintiff, evidence was introduced tending to prove the facts upon which the instructions in each behalf were predicated, and especially evidence tending to show the value of that part of defendant's (Shoemaker's) land which was taken, and the depreciation in the value of the residue thereof, and also the value of the land before the right of way was taken, and what its value would be thereafter; there being a substantial conflict in the estimates of the witnesses on behalf of defendant and plaintiff, respectively." As indicating the theory on which defendant sought to show his damages, the following question was put to all, or nearly all, of his witnesses: "Q. Now, Mr. Jones, taking into consideration the quantity of land taken, which is agreed to be 933 acres, the size and shapes of the tracts into which the one tract is divided, as its market value may be affected by that division into those sizes and shapes, and the cuts and fills on that tract, and the difficulty, if any, of getting from one side to another by having to go to railroad crossing to get over from one side to the other, what, in your opinion, would be the depreciation in value of

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the tract on account of those inconveniences? Answer. I don't know that I fully understand the question. Question. The question is, taking into consideration all these elements that may affect the market value of the farm,—the land taken, the division of the one tract into two, the cuts and fills, the inconvenience of getting from one side to the other, and all these matters that affect the market value of the land or depreciate its value,—what, in your judgment, would be the amount of that depreciation to the entire tract? Answer. I think the value of the land, which you said was about 9½ acres,—I don't know the exact amount,—figure that at an average price, and the damages to the entire farm as a whole, I think it would run in the neighborhood of \$2,800 or \$2,850 perhaps." Other witnesses to the same question estimated the damages at a smaller sum. At the close of all the evidence, the court instructed the jury, on behalf of defendant, Shoemaker, as follows: "(1) In estimating the damages to be allowed the defendant, the jury will take into consideration the amount and value of the land taken for right of way, the size and shape of the two tracts into which the farm is divided by the location of the right of way through it, the cuts and fills, the inconvenience in getting from one part of the farm to another on account of the location of the railroad, any inconvenience in getting to water, and will allow defendant such sum as will reasonably compensate him for the injury he has sustained by the appropriation of the right of way through the farm. (2) The jury will make their estimate of damages as of the date when the commissioners acted, on the 2d day of November, 1897. (3) In estimating the defendant's damages, the jury will take into consideration the fact that the east 160 acres of the farm is under lease expiring March 1, 1899, and that the lessee under said lease is entitled to the possession of said 160 acres until said March 1, 1899." To the giving of which instructions in behalf of defendant, Shoemaker, plaintiff at the time excepted, and still excepts. And, on behalf of plaintiff, the court instructed the jury as follows: "(1) The court instructs the jury that, under the law, the railroad company will be liable hereafter to the defendant for any damages which he may sustain by reason of destruction of property by fire which may be set or caused \* \* \* by the trains of the railroad company in operating its line, and any such damages, if any, he ever sustains, will be the proper subject-matter of future actions; but, in determining the amount of compensation which you will allow the defendant in this action, you cannot take into consideration nor allow any sum or amount whatever on account of exposure or liability of property to damage or destruction by fire caused or set by the trains in the operation of the road. (2) The court instructs the jury that in arriving at your verdict, and in estimating the amount of damages, if any, which you will allow the defendant, you should not take into consideration as an element of damage any

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danger to life and limb, if any, which may arise from trains passing over the road. (3) The court instructs the jury that, when you retire to your room to consider your verdict in this case, you have no right to determine the amount of your verdict by marking down the amount estimated by each juror, and by addition ascertain the sum total, and then dividing by twelve, the number of the jury, and that all verdicts arrived at in that manner are unlawful and illegal. (4) The court instructs the jury that the phrase 'market value,' as used in these instructions, does not mean what the defendant holds the land at, nor what he asks for it, nor does it mean what the land may be worth to any particular person for any particular purpose, but said phrase does mean the fair selling value of the land in the market to be used for any of the purposes to which it is susceptible of being put, either in its present condition or any condition to which it is susceptible of being changed. (5) The court instructs the jury that in arriving at your verdict, and in estimating the amount of damages, if any, which you will allow the defendant, you should not take into consideration any damage, if any, which may arise from, or be due to, smoke or noise from trains passing over the road, or the ringing of bells or sounding of whistles. (6) The court instructs the jury that in arriving at your verdict and in estimating the amount of damages, if any, which you will allow the defendant, you should not take into consideration any damage, if any, which may arise from the scaring, frightening, or killing of animals while on the right of way, or the danger to person of the owner, his agents or servants, in crossing said railroad. (7) The court instructs the jury that the law requires the plaintiff railway company to fence its right of way, and to construct all necessary gates and farm crossings, and, in estimating damages, the jury will consider all necessary fences and farm crossings as actually made." Under the instructions of the court, the jury returned a verdict in favor of the defendant, Peter B. Shoemaker, assessing his damages in the sum of \$2,500.

1. As already said, the only complaint in this court is of the first instruction given for defendant. Learned counsel for plaintiff rightfully say that, "When part of a tract of land is taken in a condemnation proceeding, the measure of damages is the difference between the market value thereof before, and what its market value will be after, the appropriation"; or, as it is sometimes stated, "in estimating the damages sustained by the condemnation of property for the purposes of a street or right of way, when the whole lot has not been taken, the value of the land taken should be found, and then the increase or diminution in value of the remaining portion, or the damages, may be computed by ascertaining the difference between the value of the entire lot, with improvements, before, and the value of the premises remaining after, the condemna-

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tion." *Railway Co. v. Fowler*, 142 Mo. 670, 44 S. W. 771; *Railroad Co. v. Ridge*, 57 Mo. 601; *Railway Co. v. Waldo*, 70 Mo. 629; *Railway Co. v. George*, 145 Mo. 47, 47 S. W. 11. Nor do we understand counsel for defendant controvert this as being the true rule, but they say there is nothing in said instruction in conflict with the well-settled rule in this state. While accepting the doctrine announced in the cases above cited, and many others to the same effect, they say there is no error on the part of the circuit court in advising the jury that, in arriving at the depreciation in the remainder of the farm, they might consider certain elements and exclude others.

Thus, in reaching their conclusion as to the market value of the portion of defendant's farm which was not appropriated, "they may, in estimating the diminution in value of the part left, take into consideration the amount and value of the land taken for the right of way; the size and shape of the two tracts into which the farm is divided by the location of the road through it; the cuts and fills; the inconvenience in getting from one part of the farm to the other; any inconvenience in getting to water;" and, on the other hand, they were instructed on part of plaintiff that, in reaching the amount of the damages, they should not consider any damage that might result from fires in the future, as such would be the subject-matter of future actions; nor should they consider the danger to life or limb from trains passing over the road; nor any damage from smoke or noise from trains passing over the road, or from ringing of bells or sounding of whistles; and the court expressly advised them what was meant by "market value." In a word, by a process of exclusion and inclusion, the jury were advised how to reach the amount of damages defendant had suffered by the appropriation of his land, both as to the part taken for right of way and the depreciation in the market value of the portion not taken.

Surely, there was no error in directing the jury what elements they might consider in reaching a diminution in the market value, as the instruction is practically a rescript of the language of this court in *Railroad Co. v. Story*, 96 Mo., loc. cit. 622, 10 S. W. 207, in which it is said: "There are numerous authorities holding that cuts and fills made by a railroad passing through a man's farm, and the inconvenience he will be subjected to by making it more difficult to reach the several portions of the land, are proper subjects for consideration in estimating the damages sustained." *Mills*, Em. Dom. §§ 166, 189. The circuit court nowhere, in any instruction given,—certainly not in this first instruction,—authorized the jury to give defendant for the cuts and fills, and the inconveniences in getting from one part of the farm to the other, caused by the road passing through it, as distinct elements of damages. It did rightfully permit and direct them that, in estimating the depreciation in the market value of the part left after the appropriation, they should consider those things which com-

mon experience and the law teaches us would diminish the market value of the farm, but only as bearing upon the question of the value as affected by the appropriation of a part, and a depreciation of the remainder by reason thereof. Not only did the instructions given have this meaning, but the whole trend of the evidence was directed to that issue, and that alone; and there was no proof of how much damage any one of the elements alone, or, for that matter, all of them together, as mere items of damage, amounted to, but the object of the questions to the witnesses was, as said by plaintiff in its statement, to show the value of that part of the same which was taken, and the depreciation in the value of the residue thereof, and of the value of the farm before the right of way was taken, and what its value would be after the appropriation of the right of way. It was the injury to the farm for which the jury were to allow the compensation, and to this end all the evidence was directed.

There was no error in the admission of the testimony, and none, as we have seen, in the elements which the jury might consider in reaching their estimate as to the depreciation in the value of the farm.

But counsel say the court did not say the damage was the difference between the market value before, and the market value after, the appropriation. The answer is, the failure to

~~Same-Same-~~ do so was mere nondirection, not misdirection,  
~~Same-Same-~~ and was not error in a civil case. If counsel  
~~Same.~~ desired the court to say that, in addition to what it had already said, they should have asked the instruction. Such is the rule in this court in civil cases. *Browning v. Railway Co.*, 124 Mo. 71, 27 S. W. 644; *Hickman v. City of Kansas*, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658.

An examination of the whole record satisfies us the case was properly tried to the jury, and limited, as the evidence was, to the one issue. We cannot see how the jury could have been misled, especially as the instructions on both sides limited them to the proper elements of damage. The judgment must be and is affirmed. All concur.

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ATLANTIC, S. R. & G. RY. CO.

v.

STATE.

(*Supreme Court of Florida, Dec. 4, 1900.*)

[29 So. Rep. 319.]

Construction of Connections between Railroads—Statute—Enforcement.—Section 5, c. 4205, Laws approved June 2, 1893, providing a remedy for enforcing compliance with the requirements of section 1 of

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that act, authorizes the proceedings for that purpose to be instituted and conducted in equity.

**Same—Same—Constitutionality.\***—The legislature, under the police power, may, in proper cases, require railroad companies whose roads cross or meet each other to construct such switches, side tracks, and connections as will enable them to transport cars to and from each other's lines. Such regulations do not amount to a taking of the companies' property, for which compensation must be provided.

**Same—Same—Same—Presumptions.**—In the absence of a showing that, as applied to a particular case, section 1, c. 4205, Laws approved June 2, 1893, is an arbitrary or unreasonable regulation, the court must assume that it is reasonable, and consequently a valid regulation, passed in pursuance of the police power.

(Syllabus by the Court.)

Appeal from circuit court, Bradford county; Rhydon M. Call, Judge.

Bill by the state against the Atlantic, Suwannee River & Gulf Railway Company and the Georgia Southern & Florida Railway Company. Demurrer to the bill overruled, and the Atlantic, Suwannee River & Gulf Railway Company appeals. Affirmed. L

R. H. Liggett, for appellant.

W. B. Young, for the State.

Per Curiam. On March 20, 1895, the state filed its bill of complaint against appellant and the Georgia Southern & Florida Railway Company in the circuit court of Bradford county, wherein it was alleged that the two railway companies owned and operated railroads through Bradford county; that their lines crossed each other in said county at Sampson; that each of said companies had failed and refused to comply with section 1, c. 4205, of the Laws of Florida, requiring the construction of such switches, side tracks, and connections as would enable them to transport cars to and from each other's lines; and that they had been notified in writing by the state attorney of the Fourth judicial circuit to do so, but had neglected to comply with the said provision of the statute. The bill prayed for a mandatory injunction requiring the companies to comply with the statute, and to pay the counsel fees of the state attorney. The appellant demurred to this bill, assigning the following grounds: (1) The remedy of the state, if it has any, is by mandamus, and not by bill in equity; (2) the first section of chapter 4205 of the laws of Florida is unconstitutional, because its effect is to deprive the railroad companies of their property without just compensation therefor. The court overruled the demurrer, and appellant entered this appeal to review that ruling.

The only points insisted upon here are that the state's

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\*See note at end of case.

remedy is by mandamus, and not in equity, and that the first section of chapter 4205 of the Laws of Florida is unconstitutional, because its effect is to deprive the appellant of its property without just compensation.

The first, third, and fifth sections of chapter 4205, approved June 2, 1893, are as follows:

"Section 1. That it shall be the duty of all railroad companies in this state, crossing or meeting each other at any point, to construct such switches, side-tracks and connections as will enable them to transport cars to and from each other's lines; and the expense of such construction shall be borne equally by such connecting lines of railroad: provided, that the gauge of such connecting lines is the same."

"Sec. 3. That it shall be the duty of all railroad companies or other common carriers to receive from connecting lines cars loaded with freight, or empty cars, and transport the same to their destination, or to such other connecting line as they may be consigned to, and return such cars to the connecting line from which they are received, and to deliver to the connecting lines cars loaded with freight, or empty cars, as they may be consigned; and no railroad company in this state shall charge or collect any higher rate of freight or wheelage than would be charged for transporting and delivering freights to individuals between the point of receipt and the point of delivery."

"Sec. 5. If any railroad company shall fail or refuse to comply with the provisions of section 1 of this act, it shall be the duty of the state's attorney of the judicial circuit in which is situated the line of railroad where the action is attempted, to institute suit against the offending company in the circuit court, and on the facts being proven it shall be the duty of the judge of the circuit court to render a decree requiring a compliance with the conditions of section 1; and if the railroad company shall fail or refuse to obey said decree, it shall be the further duty of the judge of the circuit court, upon the fact of such refusal being made known to him, to appoint a receiver for such road, who shall have such side tracks, switches and connections made as may be necessary, conforming to the rules of said road in placing danger signals, putting in switches and passing trains during the construction of such work; and the state shall not be liable for any damages from accident caused by and during the construction of said work when the aforesaid rules have been complied with; and the cost of the construction of the same shall be a lien on said road paramount to all others: provided, that all costs, charges, and a reasonable fee for the state's attorney shall be decreed against the railroad company in the cases where a decree is rendered against said company."

As to the first point, the court is of opinion that in view of the nature of the decree to be rendered, and the character and



## Note

extent of the relief granted by the fifth section of the act, the remedy is in chancery. The chancery court is the only court that, technically speaking, renders "decrees" and appoints "receivers," and both of these are in terms provided for by the statute. Appellant does not deny that, if the statute contemplates a proceeding in equity, this proceeding was properly brought in that court. We think the statute does authorize the proceeding to be had in equity. *Railway Co. v. Adams*, 29 Fla. 260, 11 South. 169.

As to the second point, appellant contends that the compulsory establishment of switches, side tracks, and connections can only be exercised under the power of eminent domain, and, as the statute provides no means of compensation to the railroad companies, it is unconstitutional. The court is of opinion that the statute was passed in the exercise of the police power of the state, and not that of eminent domain. *Jacobson v. Railroad Co.*, 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389; *State v. Kansas City, Ft. S. & G. R. Co.* (C. C.) 32 Fed. 722; *State v. Wabash, St. L. & P. R. Co.*, 83 Mo. 144; *State v. Jacksonville Terminal Co.*, 41 Fla. 377, 27 South. 225. The question arises here on demurrer to the bill, and as the state has the right, in the exercise of the police power, to require such regulations in proper cases, we must assume, in the absence of anything to the contrary, that this requirement of this statute is reasonable. As this is the proper ground upon which the statute rests, and the contention of appellant being entirely inapplicable, nothing further need be said.

The decree overruling the demurrer is affirmed.

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NOTE.

**Constitutional Law—Statute Requiring Track Connections at Railroad Intersections.**—Chapter 91 of the General Laws of Minnesota of 1895 is not unconstitutional as a regulation of interstate commerce, in requiring railroad companies to put in connecting switches at the intersections of their roads, to facilitate the transfer of cars and traffic from one road, to the other.

Nor will the enforcement of such statute, although it may require of the railroad company affected the exercise of the power of eminent domain, and may result in some, comparatively speaking, small expense, deprive the company of its property without due process of law, if it is reasonably necessary for the accommodation of the public, and will not, regard being had to the circumstances, unduly, unfairly, or improperly affect the pecuniary rights or interests of the company. *Wisconsin, etc., R. Co. v. Jacobson* (U. S.), 9 Am. & Eng. R. Cas., N. S., 634.

LOUIS J. GABLEMAN, JR., by His Next Friend, Louis J. Gableman, Sr., Plff. in Err.,

v.

PEORIA, DECATUR, & EVANSVILLE RAILWAY COMPANY, Edward O. Hopkins, Receiver of the Peoria, Decatur, & Evansville Railway Company, and George Colvin.

*(Submitted November 16, 1900. Decided December 10, 1900.)*

[21 Sup. Ct. Rep. 171.]

**Action against Receiver—Removal into Federal Court—Cases Arising under Federal Laws.**—The bare fact that the appointment of a receiver was by a Federal court does not make all actions against him cases arising under the Constitution or laws of the United States, which he can remove on that ground into a Federal court, where his appointment was made under the general equity powers of courts of chancery, and not under any provision of the Federal Constitution or laws, and his liability depends on general law, and his defense does not rest on any act of Congress.

On a certificate from the United States Circuit Court of Appeals for the Seventh Circuit raising questions as to the right to remove an action against a receiver into a Federal court. Questions answered in the negative.

See same case below, 101 Fed. Rep. 1.

Statement by Mr. Chief Justice Fuller:

The certificate in this case was as follows:

"This action was brought originally in the superior court for Vanderburg county, in the state of Indiana, on the 28th of August, 1897, by the plaintiff in error, a citizen of Indiana, against the defendants in error, to recover damages for personal injuries said to have been sustained by the plaintiff in error, in March, 1897, through the negligence of the defendants in error in the operation of a railway train, and the failure to properly operate the gates at a railway crossing. The defendant railway company is a corporation organized under the laws of the state of Indiana, and the defendant, George Colvin, is a citizen of Indiana. The defendant, Edward O. Hopkins, was, at the time the injuries were received and the suit was commenced, receiver of the defendant railway company, by appointment of the United States circuit court for the southern district of Illinois, and was, at the time of the injuries, in the sole control and management of the railway company, having an office in Vanderburg county, in the state

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of Indiana, the defendant Colvin being in his employment as a locomotive engineer, and as his servant operating the engine at the time of the injury. The record does not show that the duties of the defendant, Colvin, extended to the operation or maintenance of the gates at the railway crossing. The record does not disclose the place of residence, or the citizenship of Hopkins, as an individual.

"In due time after the commencement of the suit the defendant, Edward O. Hopkins, receiver, on his sole petition, removed the cause into the circuit court for the district of Indiana, upon the ground that it was a case arising under the Constitution and laws of the United States. A motion to remand was entered by the plaintiff in error, and overruled by the circuit court for the district of Indiana; and, at the trial subsequently, a verdict was, by direction of the court, returned for the defendants in error.

"The questions of law upon which this court desires the advice and instruction of the Supreme Court are:

"(1) Did the circuit court of the United States for the district of Indiana have, upon these facts, jurisdiction to try the cause?

"(2) Was the cause one properly removable into the circuit court of the United States?"

Mr. W. A. Cullop for plaintiff in error.

Mr. Walter S. Horton for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

The general policy of the act of March 3, 1887, corrected by the act of August 13, 1888 (24 Stat. at L. chap. 373, p. 552; 25 Stat. at L. chap. 866, p. 433), as is apparent on its face, and as has been repeatedly recognized by this court, was to contract the jurisdiction of the circuit courts. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 462, 38 L. Ed. 511, 514, 14 Sup. Ct. Rep. 654, and cases cited.

And it is well settled that a case cannot be removed from a state court into the circuit court of the United States on the sole ground that it is one arising under the Constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim, and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings. *Walker v. Collins*, 167 U. S. 57, 42 L. Ed. 76, 17 Sup. Ct. Rep. 738.

It has also been determined that when the application rests on that ground, and there is more than one defendant, all the defendants must join. *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. Ed. 1055, 20 Sup. Ct. Rep. 854.

And in respect of the removal of actions of tort on the ground of separable controversy, that the existence of such controversy must appear on the face of the plaintiff's pleading, and that it does not so appear, if the defendants are

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charged with direct or concurrent or concerted wrongful action. *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, ante, 67, 21 Sup. Ct. Rep. 67.

In this case the pleadings are not before us, and the certificate states that the receiver removed the cause into the circuit court, on his sole petition, "upon the ground that it was a case arising under the Constitution and laws of the United States." A motion to remand was made and denied, 82 Fed. Rep. 791. This decision was afterwards reversed by the circuit court of appeals, but, as is admitted, a rehearing was granted, and this certificate was then made. 101 Fed. Rep. 1.

The receiver rested his contention that the case arose under the Constitution and laws of the United States on the single ground of his appointment by the Federal court; and, upon this record, our opinion of the tenability of that ground is requested.

Section 3 of the acts of 1887 and 1888 reads:

"That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed so far as the same shall be necessary to the ends of justice."

This act abrogated the rule that a receiver could not be sued without leave of the court appointing him, and gave the citizen the unconditional right to bring his action in the local courts, and to have the justice and amount of his demand determined by the verdict of a jury. He ceased to be compelled to litigate at a distance, or in any other form, or according to any other course of justice, than he would be entitled to if the property or business were not being administered by the Federal court.

The object of the section is manifest, and it is equally plain that that object would be open to be defeated if the receiver could remove the case at his volition. The intention to permit this to be done cannot reasonably be imputed to Congress, and, moreover, such a right would be inconsistent with the general policy of the act.

As, however, the receiver, as the officer of the court, holds the property for the benefit of all who have an interest in it, and is not to be interfered with in its administration and disposal by the judgment or process of another court, the closing clause of the section, out of abundant caution, provides that when the receiver is sued, without leave, "such suit shall be subject to the general equity jurisdiction of the court in which said receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

Of course it devolves on the court in possession of the property or funds out of which judgments against its receiver must

## Gableman v. Peoria, etc., Ry. Co

be paid to adjust the equities between all parties, and to determine the time and manner of payment of judgment creditors necessarily applying for satisfaction from assets so held to the court that holds them. But, as we observed in *Texas & P. R. Co. v. Johnson*, 151 U. S. 103, 38 L. Ed. 89, 14 Sup. Ct. Rep. 250, "the right to sue without resorting to the appointing court, which involves the right to obtain judgment, cannot be assumed to have been rendered practically valueless by this further provision in the same section of the statute which granted it."

In *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 243, 44 L. Ed. 1054, 20 Sup. Ct. Rep. 867, we said, in the language of previous opinions, that when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained. *Little York Cold Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. Ed. 276, 20 Sup. Ct. Rep. 222; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. Ed. 864, 20 Sup. Ct. Rep. 726.

The inquiry we are pursuing does not fall within the ruling that a corporation created by Congress has a right to invoke the jurisdiction of the Federal courts in respect to any litigation it may have, except as specifically restricted.

Nor are the cases against United States officers as such, or on bonds given under acts of Congress, or involving interference with Federal process, or the due faith and credit to be accorded judgments, in point.

The question is whether the bare fact that the appointment of this receiver was by a Federal court makes all actions against him cases arising under the Constitution or laws of the United States, notwithstanding he was appointed under the general equity powers of courts of chancery, and not under any provision of that Constitution or of those laws; and that his liability depends on general laws, and his defense does not rest on any act of Congress. We are of opinion that this question must be answered in the negative, and that this has been heretofore so determined as the circuit court of appeals properly held in this case. *Bausman v. Dixon*, 173 U. S. 113, 43 L. Ed. 633, 19 Sup. Ct. Rep. 879; *Pope v. Louisville, N. A. & C. R. Co.*, 173 U. S. 573, 43 L. Ed. 814, 19 Sup. Ct. Rep. 500; *McKenna v. Simpson*, 129 U. S. 506, 32 L. Ed. 771, 9 Sup. Ct. Rep. 365; *Provident Sav. Life Assur. Soc. v. Ford*, 114 U. S. 635, 29 L. Ed. 261, 5 Sup. Ct. Rep. 1104.

## Gableman v. Peoria, etc., Ry. Co

In *Bausman v. Dixon* we ruled that a judgment against a receiver appointed by a circuit court of the United States, rendered in due course in a state court, does not involve the denial of an authority exercised under the United States or of a right or immunity specially set up or claimed under a statute of the United States. That was an action to recover for injuries sustained by reason of the receiver's negligence in operating a railroad company chartered by the state of Washington, though the receiver was the officer of the circuit court, and we said: "It is true that the receiver was an officer of the circuit court, but the validity of his authority as such was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or, so far as appears, in the state supreme court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the circuit court appointing a receiver did not create a Federal question under § 709 of the Revised Statutes, and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the state court. The liability to Dixon depended on principles of general law applicable to the facts, and not in any way on the terms of the order." And although that was the case of a writ of error to a state court, we applied the reasoning in *Pope v. Louisville, N. A. & C. R. Co.*, in which the right of appeal to this court from the circuit court of appeals was asserted on the ground that the case arose under the Constitution and laws of the United States, because Pope was a receiver of a Federal court. We decide that the suit was ancillary to the original cases in which the receiver was appointed, and that the jurisdiction was dependent on the ground of jurisdiction in those cases, and we also held that the receiver's orders of appointment were not equivalent to laws of the United States in the meaning of the Constitution, and that the mere order of a Federal court, sitting in chancery, appointing a receiver, did not in itself form adequate ground of jurisdiction. We said: "The bill nowhere asserted a right under the Constitution or laws of the United States, but proceeded on common-law rights of action. We cannot accept the suggestion that the mere order of a Federal court, sitting in chancery, appointing a receiver on a creditor's bill, not only enables the receiver to invoke Federal jurisdiction, but to do this independently of the ground of jurisdiction of the suit in which the order was entered, and thereby affect the finality of decrees in the circuit court of appeals in proceedings taken by him. The validity of the order of the appointment of the receiver in this instance depended on the jurisdiction of the court that entered it, and that jurisdiction, as we have seen, depended exclusively upon the diverse citi-

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zenship of the parties to the suits in which the appointment was made. The order, as such, created no liability against defendants, nor did it tend in any degree to establish the receiver's right to a money decree, nor to any other remedy prayed for in the amended bill. The liability of defendants arose under general law, and was neither created nor arose under the Constitution or laws of the United States."

The question there was as to whether or not the decision of the circuit court of appeals was made final by the sixth section of the judiciary act of March 3, 1891, and we held that it was, and dismissed the appeal. We could not, however, have arrived at that conclusion if the jurisdiction had rested on the ground that the case arose under the Constitution or laws of the United States, as such cases are not among the classes enumerated in that section, in which the decisions of that court are made final. We have repeatedly held that the jurisdiction of such proceedings is dependent upon that of the main case. *Rouse v. Letcher*, 156 U. S. 49, 39 L. Ed. 342, 15 Sup. Ct. Rep. 266; *Gregory v. Van Ee*, 160 U. S. 643, 40 L. Ed. 566, 16 Sup. Ct. Rep. 431; *Carey v. Houston & T. C. R. Co.*, 161 U. S. 115, 40 L. Ed. 638, 16 Sup. Ct. Rep. 537. In *Rouse v. Letcher* we pointed out that the intention could not be attributed to Congress of allowing judgments on every incidental controversy to be brought to this court for review, while denying such review to the principal decree; and any other conclusion would be manifestly inconsistent with the avowed object of the act of March 3, 1891.

It should be added that while these actions against receivers may be brought in other courts, they may, nevertheless, also be brought in the court by which the receiver was appointed, inasmuch as the judgments recovered are payable from the property or funds in the course of administration, and the actions may be regarded as ancillary in the sense of subordination to such administration.

We have just held in *Baggs v. Martin*, 179 U. S. —, ante, 109, 21 Sup. Ct. Rep. 109, that where a receiver sued in the state court had removed the action to the circuit court which had appointed him, and the plaintiff had not moved to remand but had accepted the jurisdiction thus invoked, a judgment in that court in plaintiff's favor might be sustained, because the court would have had original jurisdiction, and it did not lie in the mouth of the receiver, under such circumstances, to deny the jurisdiction he had sought.

The judgments in *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829, 12 Sup. Ct. Rep. 905; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. Ed. 511, 14 Sup. Ct. Rep. 654; and *Rouse v. Hornsby*, 161 U. S. 588, 40 L. Ed. 817, 16 Sup. Ct. Rep. 510, cited by counsel, are consistent with the result reached in *Baggs's Case*, as well as in this, although there are expressions in the opinions in those cases which are modified by what has since been said.

The questions propounded are answered in the negative.

STATE

v.

INTOXICATING LIQUORS *et al.*

(*Supreme Judicial Court of Maine, Sept. 21, 1900.*)

[47 Atl. 531.]

**Interstate Shipments—State Powers—Seizure—Construction of "Wilson Act."**—The act of congress of August 8, 1890, commonly known as the "Wilson Act," was not intended to, and does not cause the power of a state to, attach to interstate commerce shipments while the merchandise is in transit under such shipments, until its arrival at the point of destination, and delivery there to the consignee.

**Same—Same—Same—Intoxicating Liquors.**—Intoxicating liquor was shipped from Portsmouth, N. H., in October, 1899, by the Boston & Maine and the Grand Trunk Railroads, accompanied by a continuous waybill, and was consigned to a person in Lewiston, Me. While it was in the car, standing on the siding at Auburn, it was seized by the Auburn police officers, taken from the car, and removed to the depository where seized liquors are kept. At the time of its seizure it was in transit, not having reached its destination, nor having been delivered to the consignee.

According to the authority of the supreme court of the United States in the case of *Rhodes v. Iowa*, 18 Sup. Ct. 664, 170 U. S. 412, 42 L. Ed. 1088, in a similar case, it follows that this seizure was made while the liquor continued to be an interstate shipment, and before it had become subject to the operation of the laws of the state of Maine.

*Held*, that the seizure was therefore premature and unauthorized.

**Same—Same—Same—Same—Constitutionality of Statute.**—Whether, after actual notice to the consignee of the receipt of the goods in the freight warehouse, and neglect on his part to remove them after the lapse of a reasonable time, the warehouseman may, under some circumstances, be deemed to hold them as agent of the consignee, and the act of interstate commerce accordingly be held complete, is a question which was not considered by the federal court, nor does it arise in the case at bar; for it distinctly appears here that the liquor was seized before it had reached its destination, and before its delivery to the consignee.

*Held*, that while, therefore, intoxicating liquor continues to be recognized by federal authority as a legitimate subject of interstate commerce, that clause of section 31 of chapter 27 of the Revised Statutes of Maine, which declares that "no person shall knowingly bring into the state \* \* \* any intoxicating liquor with intent to sell the same in the state in violation of law," must be held inoperative, as repugnant to the constitution of the United States.

(Official.)

Appeal from supreme judicial court, Cumberland county.

Seizure and search proceedings by the state against certain intoxicating liquors, and the Grand Trunk Railway Company



proceeded against, the same as if they were unlawfully kept and deposited in any place."

The act of congress of August 8, 1890, commonly known as the "Wilson Act," is in these terms:

"All fermented, distilled or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason introduced therein in original packages or otherwise."

Is it insisted, however, in behalf of the claimant, that, inasmuch as the transportation of intoxicating liquors from one state to another is declared to be interstate commerce, the regulation of which has been committed to congress by the federal constitution (*Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700), any construction of these statutes which would authorize a seizure of liquors under the circumstances disclosed in the case at bar would give to the statute of Maine an extraterritorial operation, and to that extent render the act repugnant to the constitution of the United States, as hereinbefore stated.

The *Bowman Case*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700, decided before the passage of the Wilson act of August 8, 1890, was an action to recover damages against a railway company for refusing to carry the liquor in question from Illinois into Iowa. In defense the company sought to justify its refusal by the provisions of the Iowa statute which prohibited the delivery of intoxicating liquors within that state. But it was the opinion of a majority of the court that the transportation of such liquors from one state into and across another was interstate commerce, and as such was protected from the operation of state laws from the moment of shipment until the act of transportation was terminated. It was accordingly held, although by a divided court, that the statute of Iowa of the same scope and effect as the Maine statute above quoted, so far as it affected interstate commerce, was repugnant to the constitution of the United States and void.

In *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, announced two years later, but prior to the passage of the Wilson act of 1890, it was held, also by a divided court, three justices dissenting, that the right to sell the imported liquor in the original packages, free from interference by state laws, was also protected by the federal constitution, as by the act of sale alone the merchandise would become mingled with the common mass of property in the state. "Up to that point

## State v. Intoxicating Liquors

of time," say the court, "we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or nonresident importer.

\* \* \* The responsibility is upon congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

Thereupon congress promptly interposed by enacting the Wilson law above quoted, declaring that all such liquors transported into any state "shall, upon arrival in such state, \* \* \* be subject to the operation and effect of the laws of such state."

But, recognizing the paramount authority of the federal decisions upon this subject, our own court announced its judgments in two cases which had arisen prior to the passage of the Wilson act, viz.: State v. Intoxicating Liquors, 82 Me. 558, 19 Atl. 913, and State v. Intoxicating Liquors, 83 Me. 158, 21 Atl. 840.

The construction of the Wilson act was not determined by the supreme court of the United States until it was brought directly in question in the case of Rhodes v. Iowa, 170 U. S.

412, 18 Sup. Ct. 664, 42 L. Ed. 1088. In that case the intoxicating liquor in question was transported under a continuous way-bill from Illinois to a point in Iowa by one line of railway, and thence by another line of railway, wholly within the latter state, to the place of its destination. The package had been removed from the car and deposited on the platform by the trainmen. It was then carried by the plaintiff, the station agent at that point, into the freight warehouse, where it remained about an hour, when it was seized by a constable under a search warrant. For this act of moving the goods from the platform to the freight house the plaintiff in error was convicted in the state court, under the statute of Iowa, of unlawfully conveying intoxicating liquor "from one place to another in the state." Whether the consignee had actual notice of the arrival of the package, and a reasonable opportunity to remove it from the freight warehouse before the seizure, did not appear. It was held by the federal court, again divided, three justices dissenting, that this conviction was erroneous, for the reason that the act of the plaintiff in thus moving the package was a part of the interstate commerce transportation, and was performed before the law of Iowa could constitutionally attach to it. In the majority opinion it is said: "We think that, interpreting the statute by the light of all its provisions, it was not intended to, and did not cause the power of the state to, attach to an interstate commerce shipment while the

Interstate Ship-  
ments—State  
Powers—Seizure  
—Construction  
of "Wilson Act."

Same—Same—  
Same—Intox-  
icating Liquors.

## State v. Intoxicating Liquors

merchandise was in transit under such shipment, and until its arrival at the point of destination, and delivery there to the consignee."

Whether, after actual notice to the consignee of the receipt of the goods in the freight warehouse, and neglect on his part to remove them after the lapse of a reasonable time, the warehousemen may, under some circumstances, be deemed to hold them as agent of the consignee, and the act of interstate commerce accordingly be held complete, is a question which was not considered by the federal court. Nor does it arise in the case at bar; for it distinctly appears here that the liquor was seized by the police officers in the cars of the railway company while it was standing on the siding at Auburn before it had reached its destination in Lewiston, and it is expressly conceded in the agreed statement of facts that the seizure was made while the liquor "was in transit, and before its delivery to the consignee." It follows that, upon the authority of *Rhodes v. Iowa*, supra, this seizure was made while the liquor continued to be an interstate shipment, before the transportation of it had terminated, and before it had become subject to the operation of the law of the state of Maine. The seizure was therefore premature and unauthorized.

The observation of Chief Justice Peters in *State v. Intoxicating Liquors*, 82 Me. 558, 19 Atl. 913, respecting the federal case of *Leisy v. Hardin*, supra, is equally applicable to *Rhodes v. Iowa*, above cited: "The opinion of a minority of the court sitting in that case appears to be very elaborate and exhaustive of the question involved, and may commend itself to many as containing the better conclusion. Our obedience is due, however, to the judgment which prevails."

While, therefore, intoxicating liquor continues to be recognized by federal authority as a legitimate subject of interstate commerce, that clause of section 31 of chapter 27 of the Revised Statutes of Maine, which declares that "no person shall knowingly bring into the state \* \* \* any intoxicating liquor with intent to sell the same in the state in violation of law," must be held inoperative, as repugnant to the constitution of the United States.

The entry must therefore be—

Judgment for the claimant.

Order for return of liquors to issue.

Same—Same—  
Same—Same—  
Constitutionality  
of Statute.

RISINGER

v.

SOUTHERN RY. CO.

(*Supreme Court of South Carolina, March 11, 1901.*)

[38 S. E. 2.]

**Crossings—Signals—"Traveled Place"—Statute.**—An open space, which people have traversed for years in going from the streets of a town to a depot, is a "traveled place," within Rev. St. 1893, § 1685, requiring a railroad company to ring the bell and blow the whistle at such places before crossing.

**Same—Personal Injuries—Speed within Town—Negligence—Question for Jury.\***—In an action against a railroad company for personal injuries received at a crossing, the question of whether or not the running of an engine and tender through a town at a high rate of speed constitutes negligence is a question for the jury, and cannot be decided by the court on motion for a nonsuit.

Appeal from common pleas circuit court of Lexington county; James Aldrich, Judge.

Action by Mrs. Debby Risinger against the Southern Railway Company. At the close of evidence motion for nonsuit was granted, and plaintiff appeals. Reversed.

Efird & Dreher and E. L. Asbill, for appellant.

B. L. Abney, for respondent.

Pope, J. The complaint alleged that Jacob D. Risinger was killed on the 23d day of January, A. D. 1897, in the county of Lexington, in said state, by the defendant's engine and tender, run on its track through the corporate limits of the town of Leesville, "so negligently, rapidly, and unskillfully, and without giving the statutory signals of blowing its whistle and ringing the bell, across an open space adjoining a street crossing defendant's track in front of its depot, where people were accustomed to pass and repass, continuously, in going from the street of the town to defendant's depot," and that thereby the plaintiff, as administratrix of the estate of said Jacob D. Risinger, was entitled to recover \$1,950 damages, for the benefit of herself as the widow and the eight children of the said Jacob D. Risinger, deceased. Of course, this is an action under Lord Campbell's act. At the hearing before Judge Aldrich and a jury, after plaintiff had offered her testimony, the defendant moved for a nonsuit on

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\*See note, 12 Am. & Eng. R. Cas., N. S., 322 *et seq.*

*Risinger v. Southern Ry. Co*

grounds we shall hereafter specify. Judge Aldrich granted the motion by a short order. The plaintiff now appeals.

The grounds upon which the nonsuit was granted, in the language of the circuit judge, are: "When a motion for nonsuit is made, it is the duty of the court to pass upon it as he would any other issue presented to him. Without undertaking to elaborate the grounds of this motion, or to follow the argument presented on either side, I think it will be proper, first, to refer to the allegations of the complaint. Inverting somewhat the order of the allegations, the charge is that Mr. Jacob D. Risinger was killed by this train. The allegation is that he was killed while upon or crossing an open space adjoining a street crossing on defendant's track in front of its depot, where people were accustomed to pass and repass continuously in going from the street of the town to defendant's depot. The allegation is specific that it was not a highway. It was not a street, because the allegation is that this open space adjoins a street, and the allegation is that it is an open space, where people were accustomed to pass and repass continuously in going to and from the street of the town to defendant's depot. Assuming, therefore, that the purport of this allegation is to allege that this open space was a traveled place, in the sense of the statute, we must construe, first, what a 'traveled place' is. It is where the public not only travel, but have a legal right to travel. Now, the testimony here, in my judgment, all of it proves an occupation of that open space by permission of the railroad. There is no evidence tending to show that that open space was a traveled place. The next allegation is that it was negligence in the failure of the engineer to give the statutory signal of blowing the whistle and ringing the bell. That statutory duty is placed upon the railway company for the protection of travelers upon highways, streets, and traveled places; and if, as alleged here, the person was not killed on such highway, street, or traveled place, the failure to give those signals could not be actionable. Another is as to the rapid running of the engine. The rapid running of a train, per se, is no evidence of negligence. The other allegation is that it was negligent by leaving a car upon a side track. The railroad had the right to leave its car upon this side track, if it does so in accordance with law, and there is nothing shown here that the conduct of the railway company in placing its car where it was is illegal."

The circuit judge erred, as it is suggested by the appellant, (1) in that he held it was not negligence per se to run "an engine and tender at a rapid and reckless rate of speed through a town"; (2) in that he did not hold that a place prepared by the defendant company for the use of the public, and which the public used by its consent, in attending to business with it, was a "traveled place," under Rev. St. § 1685; (3) in that he did not hold that a way used by the public for more than 20 years across defendant's track was a "traveled place,"

## Risinger v. Southern Ry. Co

under Rev. St. § 1685; (4) in that he took away from the jury the question of whether or not the place at which Risinger was killed was a "traveled place," under Rev. St. § 1685; (5) in that he erred in not holding that it was negligence per se for the defendant to cross the street and traveled place in the town of Leesville with its locomotive, without ringing the bell and blowing the whistle; (6) in that he erred in deciding that the acts of Risinger were the proximate cause of his death, when he should have submitted to the jury the question of proximate cause upon the proof tending to show negligence in the defendant and contributory negligence in Risinger; (7) in that he erred in striking out as speculative the following question and answer: "Q. Now, if that engine had had its cars to it, and had been running at the ordinary rate of speed that trains run through that town, and making the ordinary noise, could'nt Mr. Risinger have passed from where he was around to— Mr. Abney: I object. Mr. Efird: Wait until I finish. If that train had been running at the usual rate of speed, and had had cars enough to make the usual noise that trains running through there make, couldn't Mr. Risinger have had time enough to go from where you saw him around and beyond the track of the main line, from the time you first heard that noise up the road? A. Yes, sir; if it had been going at the usual speed, he could have made the time. Q. If it had been running at the usual rate of speed, he could have had time to go around there, and out, before the train struck him? A. Yes, sir."

This court has in several instances in the past construed the two sections of the statute of this state intended to regulate the conduct of a railroad in running its engine and cars across highways, streets, or traveled places, without ringing its bell or sounding its whistle when within 500 yards of such highway, street, or traveled place (see sections 1685, 1692, Rev. St. 1893), so far as "traveled place" is concerned. The meaning attached by such decision to "traveled place" is as laid down in *Hankinson v. Railroad Co.*, 41 S. C. 20, 19 S. E. 206: "The rule, as we understand it, is that, to constitute a 'traveled place,' it must not only be a place where persons are accustomed to travel, but it must also be a place where persons have in some way acquired the right to travel. *Hale v. Railroad Co.*, 34 S. C., at page 299, 13 S. E. 537, affirmed in *Barber v. Railroad Co.*, 34 S. C., at page 450, 13 S. E. 630." As was remarked by the late Chief Justice Simpson in *Neely v. Railroad Co.*, 33 S. C., at page 139, 11 S. E. 636: "Now, there can be no doubt but that the object of these sections was to prevent collisions which might occur between persons attempting to cross the track of the railroad and the locomotive and cars approaching the crossing at the same moment, and the provisions of the act did not include, and were not intended to include, injuries inflicted upon bystanders not intending to cross, \* \* \* but not upon the crossing, or using it to pass from one side to the other." The foregoing decisions correctly

set forth the true construction of the sections of the act we are now considering, when the same refer to the same questions raised by the decisions of the court as quoted just above.

But, while this is true, the case here sets up the state of facts that the railroad company had carefully prepared a place leading to its depot, which it invited the public to use, and which for years the public actually did use. Why may not this also be a "traveled place," in the language of the statute? But, apart from this, the circuit judge erred when he announced his views on this matter for a nonsuit, for there was testimony that the engine and cars were running at a high rate of speed through the town of Leesville. It was not the province of the circuit judge to determine whether such high speed of the engine and tender did or did not constitute negligence. This should have been confided to the jury for its solution, under charge of the judge as to what negligence was. Hence, without going further, this was reversible error, and the order granting the nonsuit must be reversed. It is the judgment of this court that the judgment of the circuit court be reversed, and the action remanded to that court for a new trial.

Crossings—Signals—“Traveled Place”—Statute.

Same—Personal Injuries—Speed within Town—Negligence—Question for Jury.

## GUHL

v.

WHITCOMB *et al.*

(*Supreme Court of Wisconsin, Feb. 1, 1901.*)

[85 N. W. 142.]

**Accident at Crossing—Duty to Look and Listen.**—The known presence of a railway track is notice of the momentary peril of a passing train at all times, and the duty to look and listen is not relaxed by any question as to whether one might or might not reasonably expect a train to pass.

**Same—Same—Diversion of Attention.**—The only "diversion of attention" which will excuse failure to look and listen before crossing a railway track is where the attention is so irresistibly forced to something else as to deprive a traveler of the opportunity to look and listen.

**Same—Same—Same.\***—A pedestrian approaching a railway track, omitted to look along the unobscured track to the southward while walking 50 feet. During most of that time observation to the north was futile and needless, the train to the north being nearly half a mile away, and moving slowly, and being out of vision until the pedestrian was 10 to 15 feet from the train. *Held*, that such train was not a sufficient "diversion of attention" to excuse failure to look for an approaching train from the south, the fact that the train was approaching from the

\*See generally, *Smith v. Boston & M. R. (N. H.)*, 19 Am. & Eng. R. Cas., N. S., 320, and *foot-note*, 321.

north being no assurance that one was not also approaching from the south.

**Evidence—Nude Photographs.**—The introduction of photographs showing rear views of the person of a 20 year old girl, nude from below the shoulders to mid-thigh, is improper and indecent; the proper method being to obtain the evidence by a private examination by experts out of court, and expert testimony by them.

Appeal from circuit court, Winnebago county; George M. Burnell, Judge.

Action by Bertha Guhl against H. F. Whitcomb and others, receivers, etc. From a judgment for plaintiff, defendants appeal. Reversed.

Action for personal injuries received by plaintiff about five miles south of Oshkosh, at a crossing of a north and south highway with the Wisconsin Central Railroad, which at that point ran so nearly north and south that the angle of crossing was only 16 degrees. Plaintiff, a girl 19 years of age, resided with her father about a quarter of a mile south of the crossing, and between the highway and the track. On the 28th of March, 1896, she started from her father's house northward on her bicycle, and rode to the crossing of an east and west highway about half way to the railroad crossing, where she dismounted to cross a mud puddle. She then looked to the eastward and southward towards the track, of which she could see about a quarter of a mile south of the crossing. She mounted her wheel, and proceeded to a point in the highway 105 feet south of the crossing, which point was about 30 feet due west of the track, and about on a line with the right of way fences. Approaching this point, she had noticed a train to the northward, a long way off, which at this point was obscured by fences and elevation in the ground, though she could still see the smoke. At this point she dismounted, and looked southward. The amount of the track south of the crossing within her vision is variously estimated at from 800 feet to 80 rods. She then proceeded on foot, slowly, looking continuously to the northward, her vision of the train in that direction being obscured by the cattle-guard fences until she reached a point a few feet from the track, when she saw a freight train to the northward, which was in fact stationary, and something more than 2,000 feet away, but which she thought was moving slowly towards her. Without looking to the southward, she proceeded slowly to and onto the track, at which moment she was struck by a regular passenger train then due, running at a high rate of speed northward. At any point within the last 50 feet of her course before reaching the railroad track her vision of the track to the southward was unobscured substantially as far as the eye could reach, but at no point subsequent to that 105 feet away had she looked to the southward. She heard the rumble of a train, which she took to be the freight train to the northward of her. There was evidence of failure on the part of defend-



ants' employees to give the requisite signals by whistle or bell. The court instructed the jury, among other things, that "the duty of a traveler before crossing a railway to look both ways and listen depends upon the conditions that he might reasonably expect the coming of a train at any and all times, and that his attention is not reasonably arrested or diverted"; and that they must determine whether it was "ordinary care and prudence on the part of the plaintiff to fail to look to the south, and see this train approaching, when her attention was taken up by watching the train which was coming from the north." A general verdict was rendered for the plaintiff against defendants' motion to direct one for the defendants, which the court refused to set aside upon motion, and entered judgment for the plaintiff, from which the defendants appeal.

Howard Morris and Thomas H. Gill, for appellants.

Earl P. Finch and Fred Beglinger, for respondent.

Dodge, J. (after stating the facts). The two principal errors assigned consist in the denial of motion to direct a verdict on the ground of plaintiff's contributory negligence, and in the giving as a rule of law to the jury the sentence quoted in the statement of facts, together with some other instructions further developing the same idea. That sentence is adopted from the opinion in *Ward v. Railway Co.*, 85 Wis. 601, 604, 55 N. W. 771, and, unless later decisions of this court have modified that case, the instruction assailed is not unsupported by authority. A review of the subsequent cases, therefore, becomes necessary. It will be observed that the instruction under consideration exempts a traveler from the absolute duty to look and listen in the absence of either of two conditions: First, that the situation is such that he may reasonably expect the coming of a train at any and all times; and, second, that his attention is not reasonably arrested or diverted. The first of these exceptions to the rule of duty to look and listen, namely, that the situation must be such that one may reasonably expect a train to pass, was repudiated within a year after the decision of the *Ward Case* in *McKinney v. Railway Co.*, 87 Wis. 284, 58 N. W. 386, under circumstances more strongly inviting its recognition. In the *Ward Case* the exception was predicated on the fact that a train had just passed, and plaintiff failed to look and see a loose car following it. In the *McKinney Case* two trains had passed, and plaintiff failed to look and see a third, following more closely than customary and than permitted by rules of the company. Under those circumstances it was said, "The track itself is a danger signal." In his dissenting opinion Mr. Justice Winslow pointed out that the decision in substance overruled the *Ward Case*. Again, in *Schlimgen v. Railway Co.*, 90 Wis. 186, 193, 62 N. W. 1045, 1047, was excluded the possibility of legitimate inference that under any circumstances a railway track is safe; the court saying, "A railroad track is, in effect, a standing proclamation to

those approaching it that cars are liable to run thereon at any time." In *Nolan v. Railway Co.*, 91 Wis. 16, 26, 64 N. W. 319, 322, the above language was quoted and applied where plaintiff had observed that the train headed west, which injured him, was stationary at the depot, 200 feet away, engaged in loading freight, and his attention was engaged in looking for a train due from the west. *McCadden v. Abbot*, 92 Wis. 551, 66 N. W. 694, plaintiff, a fireman, observing the engine which injured him, stationary, taking on coal, went a short distance, and crossed the track without looking, and was run down because the engine traveled 15 miles per hour, whereas if it had pursued the custom, known to plaintiff, of traveling only 6 miles per hour in that part of the yard, he would have been in no peril. In this situation it was reiterated that the track was a standing proclamation of danger, and that failure to look by one having the opportunity was of itself contributory negligence, and precluded recovery. There was cited with approval *Nixon v. Railway Co.*, 84 Iowa, 331, 51 N. W. 157, to the effect that knowledge of a custom to run trains in only one direction on the particular track was no excuse for failure to look both ways. In *White v. Railway Co.*, 102 Wis. 489, 78 N. W. 585, it was held that absence of usual warning by gates was no excuse to a foot passenger for omission to look, when he had the opportunity, before stepping on the track. From these later decisions we think it should have been apparent to the trial court that the somewhat obiter remark in the *Ward Case* that the duty of one to look and listen "depends on the condition that he might reasonably expect the coming of a train at any and all times" is entirely abrogated. In nearly all of the cases above quoted the *Ward Case* was urged upon the attention of the court. It is, perhaps, unfortunate that it was not mentioned by name in some of the opinions, and the implied repudiation of some of its doctrine made explicit. However, in view of the cases above mentioned, it cannot be doubted that the rule of this court, now settled too firmly to permit question, is that the known presence of a railway track is itself notice of the momentary peril of a passing train at all times, and the duty to look and listen is not relaxed by any opportunity for theorizing or difference of opinion as to whether a train is or is not likely to pass. Observation, not logic, is the proper precaution.

The instruction of the court—adopted, as we have said, from the *Ward Case*—that, if a traveler's attention is "reasonably arrested or diverted," his duty to look and listen is

Same—Same—  
Diversion of  
Attention.

abrogated, involves a misleading use of terms. "Diversion of attention" had long before been adopted to express conditions under which the watchfulness of one traveling on a sidewalk might be relaxed, consistently with ordinary care. The expression had thus acquired a meaning in the law which obviously renders it inapplicable to the duty of vigilance resting on one about to

cross a railway track, which is not, like city sidewalks, an assurance of probable safety, but, on the contrary, a proclamation of peril. The expression was used (casually, it is true) in *Piper v. Railway Co.*, 77 Wis. 247, 46 N. W. 165, but there it was applied to a situation where the plaintiff's attention was irresistibly withdrawn from an approaching train by attempted runaway of his team. The expression having again been used in the *Ward Case*, and both cases being pressed on this court in *Schneider v. Railway Co.*, 99 Wis. 386, 75 N. W. 169, the present chief justice took occasion to point out that in his use of terms in the *Piper Case* he applied the expression to an absolute forcing away of the attention. That term was again used to express the situation which might excuse momentary relaxation of watchfulness in *Koester v. Railway Co.*, 106 Wis. 460, 469, 82 N. W. 295, 298. In numerous other cases circumstances which might well satisfy the expression "diversion of attention" have been held insufficient to excuse a failure to continually look and listen. *Lofdahl v. Railway Co.*, 88 Wis. 421, 60 N. W. 795; *McKinney v. Railway Co.*, supra; *Schlimgen v. Railway Co.*, supra; *Nolan v. Railway Co.*, supra; *McCadden v. Abbott*, supra; *White v. Railway Co.*, supra; *Crawley v. Railway Co.*, 101 Wis. 145, 77 N. W. 179; *Ryan v. Railway Co. (Wis.)* 83 N. W. 770; *Wills v. Railway Co. (present term)* 84 N. E. 998. The rule stated in these decisions is that the duty to look and listen is absolute where the opportunity exists. In most of these cases the exception in favor of reasonable diversion of attention was urged, and its applicability was apparent if those words be used in the sense now contended for by respondent. It is considered, therefore, that all exception to the duty to look and listen at a railroad crossing resulting from diversion of attention has been repudiated by this court except in cases where the attention is so irresistibly forced to something else as to deprive the traveler of the opportunity to perform that duty. This rule is general, and applies as well to the driver of a team as to the foot passenger, with the difference, however, that it is much more difficult to conceive circumstances surrounding the latter which can at once deprive him of the opportunity to observe and the ability to stop short of the actual peril. With him a single step, wholly under his control, crosses the danger line. With the driver, many things may complicate the situation,—momentum, conduct of horses, multiplication of perils, and the like. In the record before us there is nothing to excuse the conceded omission, while walking a distance of at least 50 feet, to look along the unobscured track to the southward. During most of that distance observation to the north was futile and needless. Plaintiff could not see the train in that direction, and she was in no peril from it till she reached the track. When she did come to a point whence the freight train was in sight, she was still 10 or 15 feet from the track, and the train, moving, as she

Same—Same—  
Same.

thought, very slowly, was more than a third of a mile away. It certainly offered no attraction and threatened no peril to preclude her from a glance in the opposite direction. Even had it been so close as to imperil her, nothing prevented her from pausing to give that glance before incurring the other danger, which the existence of the track warned her was imminent and momentary. The suggestion that the sight of the freight train was an assurance against a train from the south is not of weight. If, as she testifies, she could not see, and did not know of, a side track, she had no right in reason to infer the nonexistence of any. Indeed, the fact that the freight train was substantially stationary at a place remote from a station would suggest a passing point, if she reasoned at all on the subject. These considerations are, however, beside the issue. No process of reasoning could justify her in needlessly stepping onto the track without assuring herself by observation that no train approached from either direction. We cannot, without violation of settled rules of law, either approve the instruction given to the jury, or recognize any of the circumstances surrounding plaintiff as sufficient to justify the inference or conclusion that she was not negligent in omitting to look for a train from the south, for which precaution she had ample opportunity. Both of the assignments of error are well taken.

2. We cannot pass silently the reception in evidence of photographs showing rear views of plaintiff's person, nude from below the shoulders to mid-thigh. Such photographic exposure of the body of a 20 year old girl in a court room full of men is even more grossly improper and shocking than the conduct disclosed in *Brown v. Swineford*, 44 Wis. 282, 285, of which this court expressed its condemnation in the scathing words of Chief Justice Ryan: "No such indecency is ever necessary, or should be tolerated, in court. If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts out of court, and expert testimony be given of it. Such an exposure as was made in this case, if made without leave of the court, might well be punished as a contempt. Made with the sanction of the court, it is none the less improper and indecent, well calculated to disgrace the administration of justice, and to bring it into ridicule, if not into contempt. It is hoped that this court may never have another occasion for such censure." To those words we cannot and need not add, save to reiterate the sentiments they express, and to invoke for them the careful attention of those, whether of court or bar, who may be tempted to repeat such defilement of the proceedings in a court of justice. Judgment reversed, and cause remanded for a new trial.

**Evidence—Nude  
Photographs.**

## DONAHUE

v.

## BOSTON &amp; M. R. R.

*(Supreme Judicial Court of Massachusetts, Suffolk, March 2, 1901.)*

[59 N. E. 663.]

**Injuries to Employee Jumping on Moving Engine—Contributory Negligence—Question for Jury.\***—Where it was a part of a switchman's duties to jump on a moving engine, and the evidence whether he should have attempted to jump on at the place where he did was conflicting, and plaintiff testified that he did not know the place was dangerous, the question of his contributory negligence was for the jury.

**Same—Same—Same—Same.**—Where it was a part of a switchman's duties to jump on a moving engine, and he attempted to do so at a point where there was a pile of stones about 2½ feet high near the track, and he testified that he did not know of the presence of the stones, he was not negligent as a matter of law.

**Same—Same—Pile of Stones near Track—Safe Place to Work—Duty of Master.†**—Where plaintiff's duties as a switchman required him to jump on a moving engine, evidence that defendant left near the switch, which plaintiff had to throw, a pile of stones from 1½ to 3 feet high, and only 18 inches from the track, and allowed them to remain there several months, was sufficient to support a finding that defendant was guilty of negligence in not furnishing plaintiff a safe place to work.

**Same—Same—Same—Knowledge of Danger—Question for Jury.**—Plaintiff testified that he had never seen the stones. The court charged that if the plaintiff knew or should have known that the stones were near the switch, and was injured by them, he could not recover, and the jury found for plaintiff. *Held*, that it cannot be contended on appeal that plaintiff must have known the stones were there, since the verdict of the jury, under the instruction, necessarily determined the question to the contrary.

**Same—Same—Same—Obvious Danger—Assumption of Risk.**—There were no other similar piles of stones along the track, and plaintiff testified that he had never seen the stones in question. *Held*, that the danger occasioned by the stones was not sufficiently obvious to show that plaintiff had assumed the risk, even if he did not know of their presence.

Exceptions from superior court, Suffolk county; John A. Aiken, Judge.

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\*As to whether there can be recovery for injuries to employees caused by attempts to board moving cars and engines, see *Kilpatrick v. Grand Trunk Ry. Co.* (Vt.), 20 Am. & Eng. R. Cas., N. S., 300, and extensive note, 303 *et seq.*

†As to duty of master to furnish safe track and machinery, see generally note, 12 Am. & Eng. R. Cas., N. S., 668 *et seq.*

Action by Daniel Donahue against the Boston & Maine Railroad. From a judgment in favor of plaintiff, defendant brings exceptions. Exceptions overruled.

S. A. Fuller and Chas. H. Blood, for plaintiff.

Walter I. Badger and Sanford Robinson, for defendant.

Morton, J. This is an action to recover for personal injuries sustained by the plaintiff while in the defendant's employ, in attempting, in the course of his duty, to get on a moving engine. The accident was caused, or might have been found to be caused, by a pile of rocks, which it was alleged was in dangerous proximity to the track, and which caused the plaintiff to lose his hold, and to fall and receive the injuries complained of. The declaration contained three counts. At the close of all of the evidence, the third count was withdrawn by the plaintiff, at the suggestion of the court. The first count was at common law for not providing the plaintiff a safe place in which to do his work. The second count was under the employer's liability act for negligence on the part of a person in the service of the defendant, and in charge of a locomotive engine, in suddenly increasing the speed of the engine, while the plaintiff was attempting to get on it. The jury found, in answer to a question put by the court, that the plaintiff was not injured in that manner. The defendant requested various rulings, but the case resolves itself into three questions, and in effect has been so argued by the defendant: (1) Was the plaintiff in the exercise of due care? (2) Was the defendant negligent in providing the plaintiff with a safe place to work in? (3) Did the plaintiff assume the risk?

1. The defendant contends that the plaintiff was not in the exercise of due care in attempting to board the engine when he did. It admits that in the course of his duty he was required to get on the engine while in motion, but it says that he should have got on upon the opposite side or on the front or rear of it. The plaintiff testified that the place where he attempted to get on was the place where he had been in the habit of getting on, and that he got on there because he thought it was the safest place. He gave his reasons for not getting on or trying to get on at the other places. The jury took a view. It was for them to say, we think, whether the plaintiff was not in the exercise of due care in attempting to get on where he did. There were conflicting considerations and testimony, and it was for them to say what weight they were entitled to. It could not be ruled as matter of law that he was not in the exercise of due care. The fact that he had not noticed the pile of stones, or that, if he had noticed it, he forgot it at the moment, was not conclusive on the question of due care. *Snow v. Railroad Co.*, 8 Allen, 441.

2. Was the defendant negligent in providing him with a safe place in which to work? There was testimony tending to

show that there was a pile of stones from 18 to 24 inches from the track, a short distance from one of the switches which it was the defendant's duty, in the course of his business, to throw; that the stones varied in size from a man's fist to a man's body; and that the pile was from 1½ to 3 feet high, and had been there several months, and was rough and uneven, and looked as if the stones had been thrown there sometime when the track was being fixed. It was the duty of the defendant to exercise reasonable care to keep its tracks in a safe condition for its employees to work upon, and we think that there was evidence for the jury of negligence in that regard on its part. *Babcock v. Railroad Co.*, 150 Mass. 467, 23 N. E. 325. One of the defendant's witnesses testified that "they [the stones] were in a dangerous place; they were in a man's way; that it was a bad place for stones to be, too near the rail."

3. The remaining question is whether the plaintiff assumed the risk. The plaintiff testified that he had not noticed the stones. The court, among other things, instructed the jury that if the plaintiff knew, or in the exercise of reasonable care should have known, that the stones were at or near the switch, and was injured by them, he could not recover. This was more favorable to the defendant than it was entitled to. The jury must have found that the plaintiff did not know, or in the exercise of reasonable care was not bound to know, that the stones were there. It may be that the weight of the evidence showed that he knew, or ought to have known, that the stones were there. But, under these and other instructions, in which the attention of the jury was directed to the matter, they settled the question the other way. The defendant contends, however, that, even if the plaintiff did not know that the stones were there, the risk was an obvious one, which he must be held to have assumed. *Lovejoy v. Railroad Co.*, 125 Mass. 79; *Goldthwait v. Railway Co.*, 160 Mass. 554, 36 N. E. 486; *Thain v. Railroad Co.*, 161 Mass. 353, 37 N. E. 309. If the pile of stones had been one of many similar piles, substantially the same distance from the rails on this and other tracks, where the plaintiff's duties had taken him, it may be that he would be held to have assumed the risk. *Lovejoy v. Railroad Co.*, *supra*; *Thain v. Railroad Co.*, *supra*. But no other pile of stones, and no structure as near the track as this pile of stones was, is shown to have existed in those positions of the defendant's premises where the plaintiff's duties required him to go. It is not absolutely incredible that a person employed as the plaintiff was should not have observed the stones, and still should have been in the exercise of due care. We do not think that such conduct would be necessarily inconsistent with the ordinary habits of observation of such persons. It would be going far to say that a pile of stones like this constituted a part of the ways, works, and machinery of the defendant. They were thrown out, as there was evidence

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tending to show, while the road was being repaired, and apparently were suffered to remain there as a matter of inattention and neglect, with the possibility that they might be removed at any time. They certainly could not be said to constitute a part of the permanent ways, works, and machinery. *McGiffin v. Iron Co.*, 10 Q. B. Div. 5. It seems to us that the case is governed by *Babcock v. Railroad Co.*, supra. Exceptions overruled.

## COYLE

v.

## SOUTHERN RY. CO.

*(Supreme Court of Georgia, Oct. 31, 1900.)*

[37 S. E. 163.]

**Effect of Rule of Railroad Commission Fixing Passenger Rates Where Passenger without Ticket—Interstate Transportation.\***—The rule of the railroad commission of this state fixing train rates of fare is admissible in evidence on the trial of a case involving a controversy as to what amount a conductor was entitled to demand from a passenger without a valid ticket for transporting him from a station outside of this state to a station within the same.

**Limitations on Ticket—Authority of Ticket Agent to Waive.**—A railroad ticket having thereon a special contract, signed by the person to whom such ticket was issued, stipulating that it shall be good for the passage of that person only, does not entitle any other person to transportation; nor has a purchaser from the original holder any right to act upon an assurance given by a ticket agent that the ticket will be accepted for such purchaser's passage, when it is in the contract further stipulated that no agent shall have authority to alter, modify, or waive in any particular the terms or conditions therein set forth.

**Carriers of Passengers—Carrier's Rules—Riding without Ticket—Increased Rates.\***—Under the common law, which, unless the contrary appears, is presumptively of force in any given state of the American Union whose jurisprudence is founded thereon, a carrier of passengers has the right to make reasonable rules and regulations for the conduct of its business. (a) A rule of a railroad company operative in the state of Tennessee requiring passengers who fail to supply themselves with tickets sold at three cents per mile to pay conductors cash fares at the rate of four cents per mile is reasonable.

**Same—Same—Same—Same—Closed Ticket Office.**—One who offers to purchase a railroad ticket, to be used upon a given train, after the ticket office, so far as relates to the sale of tickets for that train, has been lawfully closed, cannot demand the right to ride upon that train without paying the train rate of fare; nor can one who has been trans-

\*See notes at end of case.



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ported upon a train from one station to another without producing a ticket or tendering the proper fare claim the right to resume his journey on that train from the latter station without making a proper settlement for the ride he has actually been permitted to take thereto.

**Ejection of Passenger.**—When a passenger was lawfully ejected from a train, and prevented from re-entering the same, he had no cause of action, unless more force than was necessary to accomplish these ends was employed.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Action by S. M. Coyle against the Southern Railway Company. Judgment for defendant. Plaintiff brings error. Affirmed.

R. J. & J. McCamy, for plaintiff in error.

Shumate & Maddox, for defendant in error.

**Lumpkin, P. J.** An action was brought by Coyle against the Southern Railway company, in which the plaintiff claimed damages for an alleged wrongful ejection from a train of the defendant. The jury found in favor of the latter, and Coyle excepted to a judgment denying him a new trial. The evidence, taken most favorably for the plaintiff, made, in substance, the following case: He purchased in Chattanooga, Tenn., a railroad ticket from that point to Dalton, Ga., which had been issued to a woman, and which, under the terms of a special contract constituting a part of the same, and signed by her, was good for passage for herself only over the defendant's road. This contract also embraced a stipulation that no agent or employee of the company had authority to alter, modify, or waive in any particular the conditions in the contract set forth. The plaintiff "doubted the validity of the said ticket," but, upon exhibiting the same to the company's ticket agent at Chattanooga, was informed by the latter that the plaintiff could ride upon it from Chattanooga to Dalton. After receiving this information, he boarded a train of the defendant, and presented the ticket to the conductor, who declined to honor it for passage, but nevertheless took it up, and demanded of the plaintiff \$1.40, the train rate of fare between the stations above mentioned. The plaintiff declined to pay this sum, but tendered \$1.15, which he claimed was the ticket rate of fare between those points. On reaching Ooltewah, a station in the state of Tennessee, the conductor required the plaintiff to leave the train. He alighted therefrom, and undertook to purchase from the agent there a ticket to Dalton. The agent, being engaged in other duties, refused to sell the plaintiff a ticket, but, in the presence of the conductor, informed him that he would be transported to Dalton, his destination, at the ticket rate of fare. To

Case Stated.

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this remark the conductor made no reply. The plaintiff then again boarded the train, and, after it had started, the conductor repeated his demand for \$1.40, and the plaintiff once more tendered him \$1.15, which was not accepted. When the train arrived at Apperson, Tenn., the next station, the plaintiff was ejected, and, at the instance of the conductor, forcibly prevented by another official of the company from again entering the train before it resumed its journey. The official just mentioned used no more force than was actually necessary to prevent the plaintiff from entering the train, and after it was under way released him, and did not, otherwise than narrated, interfere with his movements, or commit upon him any act of violence or discourtesy. The defendant introduced in evidence rule 8 of the railroad commission of Georgia, which declares that: "When a railroad company has provided agents and offices ready and open for the sale of tickets, and passengers for want of proper diligence to supply themselves therewith before getting on the train, then four (4) cents per mile for each passenger twelve years old and over, and two (2) cents per mile for each passenger five years old and under twelve, may be demanded and collected: provided, however, offices at way stations may be closed one minute before the arrival of trains." It was also proved that the rules and regulations of the railway company operative in the state of Tennessee were, as to the matter of paying fares upon trains, closing ticket offices, etc., identical with the official rule on the subject of force in the state of Georgia. The court instructed the jury that the ticket upon which Coyle undertook to ride did not authorize him to do so, and that he was not entitled to passage thereon. Also that he was not entitled to demand a ticket at Ooltewah, for the reason that it was the right of the company to close its ticket office one minute before the arrival of the train upon which the ticket desired was to be used; and, further, that under the undisputed facts of the case the plaintiff was not entitled to recover unless the servants of the company used more force than was necessary in putting Coyle off the train, or in keeping him from getting back upon it.

1. Rule 8 of the railroad commission of Georgia was admitted in evidence over the plaintiff's objection that it was inadmissible for the reason that his ejection from the defendant's train occurred in the state of Tennessee.

**Effect of Rule of  
Railroad Com-  
mission Fixing  
Passenger Rates  
Where Passen-  
ger without  
Ticket—Interstate  
Transportation.**

This rule was certainly relevant, nevertheless. It must be borne in mind that the plaintiff's contemplated journey on the defendant's train was from a point in the state of Tennessee to a point in the state of Georgia. He was insisting on the right to ride from the one to the other at the rate of three cents per mile. Being without a ticket, it was the conductor's duty to make a lawful charge, and require the passenger to pay the same in cash. As to so much of the journey as lay

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within the limits of the state of Georgia, the conductor was bound by the official rule promulgated by our railroad commission, and it is, therefore, clear that the company had a right to introduce this rule in evidence for the purpose of showing that its conductor, in demanding four cents per mile for the entire trip, was certainly authorized so to do so far as the Georgia portion of the journey was concerned.

2. The next question presented is, was the plaintiff entitled to ride upon the ticket which he presented to the conductor? Clearly, he was not. He purchased it with a doubt of its

Limitations on  
Ticket—Author-  
ity of Ticket  
Agent to Waive.

validity; and even if, in point of fact, the assurance of the ticket agent in Chattanooga really satisfied Coyle that the ticket would be honored

for his passage, he had no right whatever to rely upon what this agent told him, for the ticket itself plainly showed upon its face that it was not good except in the hands of the woman to whom it was issued, and distinctly informed him that no agent of the company had any authority to vary its terms in any particular.

3. Was the conductor right in demanding of Coyle four cents a mile for the entire journey from Chattanooga to Dalton, after properly informing him that he could not ride upon the ticket? This question should be answered

Carriage of Pas-  
sengers—Carrier's  
Rules—Riding  
without Ticket—  
Increased Rates.

in the affirmative. Being without a valid ticket, Coyle had no right to passage without paying the train rate of fare. This rate, under the

company's rules of force in the state of Tennessee, was four cents a mile,—exactly what the conductor demanded. It surely cannot be said that these rules were unreasonable. There being no evidence of any Tennessee law to the contrary, it will be presumed that the common law prevails in that state; and under the common law a carrier has the right to make and enforce all reasonable rules and regulations looking to proper conduct of the business of transporting passengers. As will have been seen from what has been said above, the conductor's demand of four cents a mile was allowable, under the official regulation prevailing in Georgia, for so much of the journey as came within its operation. If follows that the expulsion of Coyle from the train at Ooltewah was authorized and proper.

4. The next inquiry is, was the plaintiff in any better position because of his attempt to purchase at that station a ticket from there to Dalton? We think not, and for two reasons.

Same—Same—  
Same—Same—  
Closed Ticket  
Office.

In the first place, he applied for the ticket after the office, so far as selling tickets for that train was concerned, had, agreeably to the regulations of the company of force in Tennessee, been law-

fully closed. If, therefore, the beginning of his journey had been at Ooltewah, it would have been lawful to charge him four cents a mile from there to Dalton, because he was without a ticket, and without a sufficient excuse for failing to pro-

## Notes

cure one. Secondly, even if the statement of the agent at Ooltewah would, ordinarily, have bound the company to transport Coyle from that station to Dalton at the ticket rate of fare, he knew, or ought to have known, that he could not, under the facts as they existed, rely upon this statement, for he was aware of the fact (communicated to the agent) that he had made default in settling for his passage from Chattanooga to Ooltewah. Even if he had procured a ticket at the latter place, the conductor would not have been bound to allow him to complete his journey on that ticket without first settling what he owed the company for his ride from Chattanooga to Ooltewah. It seems, moreover, that Coyle fully recognized the right of the company to collect fare from him for the whole journey, for he persisted, even after again entering the train at Ooltewah, in tendering in a lump sum \$1.15, which he erroneously claimed was all the conductor had a right to exact for the whole journey. This tender was predicated, as he contended, upon a rate of three cents per mile; and the plaintiff never did at any point offer to pay, as he surely ought to have done, four cents a mile, for his journey between Chattanooga and Ooltewah. Even if he had tendered four cents a mile from the latter station to his destination, without making a like tender for the initial portion of his journey, he would not have been entitled to remain upon the train; for, so far as appears, the amount thus offered would have fallen short of the sum requisite to make four cents a mile between Chattanooga and Ooltewah and three cents a mile from the latter point to Dalton. Indeed, we are by no means prepared to say that, after having forced the conductor to eject him at Ooltewah, the company was under any legal duty to further transport Coyle on that train, notwithstanding he might have then offered to comply with the conductor's original demand of \$1.40, the train rate of fare between Chattanooga and Dalton. In this connection, see *Railroad Co. v. Asmore*, 88 Ga. 529, 530, 15 S. E. 13, 16 L. R. A. 53.

5. It follows from the foregoing that the court was right in charging the jury that Coyle was entitled to no recovery unless the company's servants, in expelling him from the train, or in preventing him from re-entering it at Apperson, used more than the necessary amount of force. On this point there was no conflict in the evidence, the plaintiff himself conceding that nothing more was done than was absolutely necessary to get him off the train and keep him off. Judgment affirmed. All the justices concurring, except Little, J., absent on account of sickness.

Ejection of  
Passenger.

## NOTES.

**RIGHT TO CHARGE EXTRA FARE FOR FAILURE TO PROCURE TICKET.**

**General Rule.**—A railroad company, where it has afforded its passengers a fair opportunity to purchase tickets, before the departure, has a

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right to discriminate among its passengers between those producing tickets and those not producing them, and to charge the latter class a higher fare than they would have been obliged to pay for the ticket had they purchased it.

*California*.—Bland *v.* Southern Pac. R. Co., 55 Cal. 570.

*Connecticut*.—Crocker *v.* New London, etc., R. Co., 24 Conn. 249.

*Illinois*.—Arnold *v.* Illinois Cent. R. Co., 83 Ill. 273, 25 Am. Rep. 386; Chicago, B. & O. R. Co. *v.* Parks, 18 Ill. 460, 68 Am. Dec. 562; Chicago, R. I. & P. Ry. Co. *v.* Brisbane, 24 Ill. App. 463; St. Louis, A. & T. H. R. Co. *v.* South, 43 Ill. 176, 92 Am. Dec. 103; St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353.

*Indiana*.—Evansville & I. R. Co. *v.* Gilmore, 1 Ind. App. 468, 27 N. E. 992; Indianapolis, etc., R. Co. *v.* Kennedy, 77 Ind. 507, 3 Am. & Eng. R. Cas. 467; Indianapolis, P. & C. R. Co. *v.* Rinard, 46 Ind. 293, 6 Am. Ry. Rep. 328; Jeffersonville, etc., R. R. Co. *v.* Rogers, 38 Ind. 116; Sage *v.* Evansville & T. H. R. Co., 134 Ind. 100, 33 N. E. 771; Toledo, W. & W. Ry. Co. *v.* Wright, 68 Ind. 586, 34 Am. Rep. 277.

*Iowa*.—Hoffbauer *v.* D. & N. W. Ry. Co., 52 Iowa 342, 3 N. W. 121, 35 Am. Rep. 278; Everett *v.* Chicago, R. & P. R. Co., 69 Iowa 15; State *v.* Chovin, 7 Iowa (7 Clarke) 204.

*Kansas*.—Union Pac. Ry. Co. *v.* Wolf, 54 Kan. 592, 38 Pac. 786; Atchison, Y. & S. F. R. Co. *v.* Duellie, 44 Kan. 394.

*Kentucky*.—Snelbaker *v.* Paducah, T. & A. R. Co., 94 Ky. 597, 23 S. W. 509; Wilsey *v.* Louisville & N. R. Co., 83 Ky. 511, 7 Ky. Law Rep. 498, 26 Am. & Eng. R. Cas. 258; Wicks *v.* Louisville & N. R. Co., 15 Ky. Law Rep. 605.

*Louisiana*.—McGowen *v.* Morgan's L. & T. R. & S. S. Co., 41 La. Ann. 732, 6 South. 606, 17 Am. St. Rep. 415, 5 L. R. A. 817, 39 Am. & Eng. R. Cas. 460.

*Maine*.—State *v.* Goold, 53 Me. 279.

*Minnesota*.—Du Laurans *v.* First Div. St. P. & P. R. Co., 15 Minn. 49, 2 Am. Rep. 102; State *v.* Hungerford, 39 Minn. 6, 38 N. W. 628; Finch *v.* Northern Pac. R. Co., 47 Minn. 36.

*Mississippi*.—Forsee *v.* Alabama, G. S. R. Co., 63 Miss. 66, 56 Am. Rep. 801.

*New Hampshire*.—Hilliard *v.* Gould, 34 N. H. 230, 66 Am. Dec. 765.

*New York*.—Bordeaux *v.* Erie R. Co., 8 Hun (N. Y.) 579; Nellis *v.* New York, etc., R. R. Co., 30 N. Y. 505; People *v.* Tillson, 3 Park Cr. Cas. (N. Y.) 234; Porter *v.* New York, etc., R. Co., 34 Barb. (N. Y.) 253.

*Ohio*.—Cincinnati, etc., R. Co. *v.* Skillman, 39 Ohio St. 444, 13 Am. & Eng. R. Cas. 31.

*Oregon*.—Poole *v.* Northern Pac. R. Co., 16 Ore. 261, 8 Am. St. Rep. 289, 19 Pac. Rep. 107.

*Pennsylvania*.—Reese *v.* Pennsylvania R. Co., 131 Pa. St. 422, 19 Atl. 72, 25 Wkly. Notes Cas. 221, 17 Am. St. Rep. 818, 6 L. R. A. 529; Ritter *v.* Philadelphia & R. R. Co., 2 Wkly. Notes Cas. (Pa.) 382.

*South Carolina*.—Moore *v.* Columbia R. Co., 38 S. Car. 1, 58 Am. & Eng. R. Cas. 493; Hall *v.* South Carolina R. Co., 28 S. Car. 261.

*Tennessee*.—Lane *v.* East Tennessee, etc., R. Co., 3 Lea (Tenn.) 124, 2 Am. & Eng. R. Cas. 278.

*Texas*.—Fordyce *v.* Manuel, 82 Tex. 527.

*Vermont*.—Stephen *v.* Smith, 29 Vt. 160.

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Where a passenger gets on a train without a ticket and pays extra for riding to a certain station, but upon getting there changes his mind and decides to ride further, he may be required to pay extra again. *Chicago, B. & Q. R. Co. v. Parks*, 18 Ill. 460.

**Right to Demand Extra Fare after Acceptance of Regular Fare.**—Where a person entered a car without having first purchased a ticket, and, having announced his destination, tendered the regular ticket fare, which the conductor accepted, and after passing on a few seats he returned and demanded the extra fare imposed by the rules of the company against passengers taking passage without tickets, the fact that the conductor accepted the regular fare and passed on a short distance did not amount to a contract to carry the passenger to his place of destination for that amount, and the passenger, in refusing to pay it, the railroad company having provided reasonable facilities for procuring a ticket, became a trespasser, and could rightfully be expelled from the car. *Lake Erie & W. R. Co. v. Mays*, 4 Ind. App. 413, 30 N. E. Rep. 1196.

**Validity of Regulation—Discrimination.**—A regulation which requires passengers who fail to procure tickets before entering the train, to pay an additional charge of 10 cents which they should be entitled to have refunded upon presentation at any ticket office of a check delivered to them by the conductor, is not unreasonable or oppressive, or needlessly inconvenient to the traveler. Nor is such a regulation unfair and partial in its operation because it provides that passengers entering the train at stations where there is no ticket office and passengers traveling on trains where, on account of the excessive rush of business, it is impossible to issue the refunding checks, shall not be required to pay the additional charge. *Reese v. Pennsylvania R. Co. (Penn.)*, 41 Am. & Eng. R. Cas. 31.

**Effect of Giving Drawback Coupon.**—A regulation adopted by a railroad company requiring passengers who board the cars without purchasing tickets to pay twenty-five cents extra, is not unreasonable, the railroads having the right to discriminate between fares paid for tickets at stations and those paid on the cars. And the fact that the company gives a drawback coupon for the extra fare and which the passenger may collect back from any agent at a station does not affect the validity of the regulation. *McGowen v. Morgan's Louisiana & Texas R. & S. S. Co. (La.)*, 39 Am. & Eng. R. Cas. 460.

**Absence of Ticket Agent—Refusal to Pay Extra Fare—Tender of Rebate Check—Right to Eject.**—When a passenger sought to buy a ticket, but could not, because the agent had left the office, and gone to meet the train, then standing at a water-tank some 206 feet away, and the passenger refused, willfully and captiously, to pay the conductor 25 cents in excess of the regular fare, and take a rebate check, (the requirement of the conductor being in accordance with his instructions, and having the sanction of the railroad commission of the state), and this refusal being persisted in until the train was stopped, the conductor was authorized to put passenger off the train. *Harrison v. Fink*, 47 Fed. Rep. 787.

**Agent Leaving Office after Expiration of Time Advertised for Departure of Train.**—A railroad company made a discount of fifteen cents upon tickets purchased of a ticket agent. Until the time advertised for the departure of the train had expired the ticket agent had been in his office.

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He left it after that time, and while the train was approaching, to aid the station agent, as he was accustomed to do, in loading the baggage. While the plaintiff did not approach the ticket office to find it vacant and the ticket seller absent until after the time had expired for the departure of the train as advertised, there was sufficient time for him to have purchased his ticket before the train actually started from the station if the ticket seller had then been in the office. He entered the train without a ticket, and the conductor, acting according to the rules of the company, demanded the full price for the fare, which the plaintiff refused to pay, insisting upon his right to be carried for the reduced rate, which he tendered, but which the conductor refused. The plaintiff was expelled from the train at the next station. *Held*, that he was properly expelled from the cars; and *held* further, that he was not entitled to purchase a ticket at the station where he was expelled, and demand to be carried on the same train. *Swan v. Manchester & Lawrence R. R. (Mass.)*, 6 Am. & Eng. R. Cas. 327.

**Must Not Exceed Charge Limited by Charter.**—A railroad company may, by a regulation of which the public are duly notified, discriminate among its passengers between those producing tickets and those not producing them, and to charge the latter a higher fare than they would have been obliged to pay for the ticket had they purchased it, but such fare can in no event exceed the charge limited by the charter. *Louisville, etc., R. R. Co. v. Guinan*, 11 Tenn. 98, 13 Am. & Eng. R. Cas. 37; *Skillman v. Cincinnati S. & C. R. R. Co. (Ohio)*, 13 Am. & Eng. R. Cas. 31.

**Whether Passenger Must Be Notified as to Regulations.**—In *Toledo W. & W. R. Co. v. Wright*, 68 Ind. 586, 34 Am. Rep. 277, it was held that a rule of the carrier requiring the payment of extra fare because of his failure to procure a ticket might be valid when applied to a passenger who had no knowledge of the rule, the court saying in its opinion: "If he (the passenger) did not know appellant's (the carrier) rules on these subjects he ought to have inquired of its agents, before he became a passenger on its cars."

**Whether Opportunity to Purchase Ticket Must Be Given—General Rule.**—A company may charge more fare where it is paid by the passenger on the cars than it charges for tickets at the ticket office; but before it can expel a passenger from the cars for refusing to pay the difference between the ticket fare and the fare required to be paid on the cars, it must have given him a reasonable opportunity to purchase a ticket. *Jefferson, etc., R. Co. v. Rogers*, 38 Ind. 116; *Chicago, etc., R. Co. v. Flagg*, 43 Ill. 364; *Illinois Cent. R. R. Co. v. Cunningham*, 67 Ill. 316; *St. Louis, etc., R. R. Co. v. Dalby*, 19 Ill. 352; *Hilliard v. Goold*, 34 N. H. 230; *Stephen v. Smith*, 29 Vt. 160; *Crocker v. New London, etc., R. Co.*, 24 Conn. 249; *Porter v. New York, etc., R. Co.*, 34 Barb. 253; *Bordeaux v. Erie R. Co.*, 8 Hun 579; *People v. Tillson*, 3 Park Cr. Cas. 234; *State v. Chovin*, 7 Iowa 204; *St. Louis, etc., R. Co. v. South*, 43 Ill. 176; *Du Laurans v. St. Paul, etc., R. Co.*, 15 Minn. 49; *Jeffersonville, etc., R. Co. v. Rogers*, 38 Ind. 116; *Indianapolis, etc., R. Co. v. Renard*, 46 Ind. 293; *The State v. Goold*, 53 Me. 279.

If a passenger has not been afforded a reasonable opportunity to pur-

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chase a ticket at the station where his journey began, he is not bound to leave the train at a station en route and purchase a ticket back to the station whence he started, and another to his destination. If he is rightly on the train without a ticket, it is his right to complete his intended journey by paying the ticket rate for his fare. *Central R. & B. Co. v. Strickland*, 52 Am. & Eng. R. Cas. 216, 90 Ga. 562, 16 S. E. Rep. 352.

Where a passenger boarded a train at a flag station to go to A., and the conductor informed him that he could ride at four cents a mile to the next office where tickets were sold, and could get off the train there and board it again and ride the rest of the way for three cents a mile, and the passenger agreed to this, paid the four cents a mile to the next station, got off the train for the purpose of procuring a ticket, and could not do so because the ticket office was closed, and then boarded the train again for the purpose of continuing his journey, and tendered the conductor three cents a mile, the latter had no legal right to put him off the train because he refused to pay four cents a mile, although he had received instructions to charge four cents a mile. *Georgia R. & B. Co. v. Murden*, 86 Ga. 434, 12 S. E. Rep. 630.

**Same—Stations Having No Ticket Office.**—A company which has provided a station without a ticket office, and at which its passenger trains stop, has not put it in the power of a traveler to comply with a rule requiring additional payment where fare is paid on the train, and such rule would be unreasonable as applied to such stations, or to such traveler, when he offered to pay the usual fare. If the railroad has failed or neglected to furnish to the traveler the opportunity to procure a ticket, and he applies for a passage or enters the train without having such ticket, but offers to pay the regular fare, it cannot lawfully eject him. *Poole v. Northern Pac. R. Co.*, 16 Ore. 261, 19 Pac. Rep. 107.

A rule of a company requiring a passenger without a ticket to pay extra fare is unreasonable and unlawful if a ticket cannot be procured at the station from which passage is taken, although the company has a system whereby the extra fare may be refunded. *Phettiplace v. Northern Pac. R. Co.*, 58 Am. & Eng. R. Cas. 61, 84 Wis. 412, 54 N. W. Rep. 1092.

One who has bought a ticket to a station where there is no ticket office, but decides, before reaching it, to go on to the next station beyond, cannot lawfully be charged more than the regular rate for the extra distance. *Phettiplace v. Northern Pac. R. Co.*, 58 Am. & Eng. R. Cas. 61, 84 Wis. 412, 54 N. W. Rep. 1092.

**Same—Cases Not Supporting General Rule.**—Where a company sells tickets for a certain distance between stations for 50 cents, but charges 55 cents where a passenger pays on the train, it may eject the passenger for failing to pay the 55 cents, though he prove that he applied to the ticket office for a ticket, but that it was closed. *Crocker v. New London, W. & P. R. Co.*, 24 Conn. 249. See also, *Wardell v. Chicago, M. & St. P. R. Co.*, 46 Minn. 514, *overruling* *Du Laurans v. First Div. St. P. R. & P. R. Co.*, 15 Minn. 49, which is in line with the general rule.

A provision in a charter authorizing the company "to fix, regulate, and receive the tolls and charges by them to be received for the transportation of property or persons" empowers the company to fix two rates



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of fares, discriminating against persons who pay to the conductor, and in favor of those who buy tickets; but the company is not bound to keep its ticket offices open at any particular time, and the fact that an office is closed, preventing a passenger from procuring a ticket, will not entitle him to be carried for the amount for which a ticket would have been sold. *Bordeaux v. Erie R. Co.*, 8 Hun (N. Y.) 579.

**Where Illegal Car Rate and Ticket Rate Less Than Maximum Legal Rate.**—If a company fix two rates of passenger fare for a distance less than thirty miles, a ticket rate and a car rate, the former within and the latter beyond the limits of its authority, and the conductor of the train, under the direction of the company, refuse to accept from the passenger less than the illegal and unauthorized rate, it is not necessary, to entitle the passenger to remain on the train, to tender more than the ticket rate, although the company might have fixed such ticket rate at a higher sum. *Smith v. Pittsburg, Ft. W. & C. R. Co.*, 23 Ohio St. 10.

**Whether Ticket Conclusive Evidence of Passenger's Rights.**—As to whether ticket is conclusive evidence of passenger's rights, see *Trezona v. Chicago G. W. Ry. Co.* (Iowa), 12 Am. & Eng. R. Cas., N. S., 104, and *foot-note*.

**Non-Transferrable Tickets—Validity of Stipulations.**—As to validity of stipulation in ticket that it is not transferrable, see *Mueller v. Chicago, B. & N. Ry. Co.* (Minn.), 12 Am. & Eng. R. Cas., N. S., 137, and *note*, 140.

**Duty to Keep Open Ticket Office.**—As to duty to keep office open for sale of tickets, see *note*, 2 Am. & Eng. R. Cas., N. S., 111 *et seq.*

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**FARQUHAR *et al.***

*v.*

**ALABAMA & V. R. Co.**

(*Supreme Court of Mississippi, Nov. 12, 1900.*)

[28 South. 850.]

**Injury to Yard Master—Negligence of Engineer—Fellow Servants.\***—Since decedent, a yard master, while riding on one of defendant's flat cars attached to a switch engine, was a fellow servant of the engineer, defendant was not liable for his death, caused by the negligence of the engineer in running the car over an iron nut accidentally on the track, whereby decedent was thrown from the car and killed.

**Fellow-Servant Rule—Effect of Repeal of Penalty for Excessive Speed in Cities.**—The repeal of a penalty for running railroad trains through towns or cities at a greater rate of speed than six miles an hour does not affect the rule that a master is not responsible to one servant for the negligence of a fellow servant in the performance of duties incident to the employment.

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\*As to whether trainmen and other employees riding on train are fellow servants, see *Railey v. Garbutt* (Ga.), 20 Am. & Eng. R. Cas., N. S., 211, and extensive *note*, 213.

Farquhar v. Alabama & V. R. Co

Appeal from circuit court, Warren county; O. W. Catchings, Special Judge.

"To be officially reported."

Action by Louise Farquhar and another against the Alabama & Vicksburg Railroad Company. From an order sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Anderson & McLaurin, for appellants.  
McWillie & Thompson, for appellee.

Terral, J. The appellants sued the defendant company for damages arising from the death of their son and brother, Edward Farquhar. Edward Farquhar was the yard master of the defendant company at Vicksburg, and in making a transfer of the passenger train across the Mississippi river, and while riding upon a flat car propelled by the switch engine, he was thrown from the car, and received fatal injuries, from which he soon thereafter died. The switch engine was running at the rate of about 25 miles per hour, and ran over a large iron nut then accidentally upon the track, which caused the misfortune. A demurrer to the complaint was sustained. The appellants admit that the action of the circuit court is in accordance with the decisions of this court in *Railroad Co. v. Hughes*, 49 Miss. 253, and in *Dowell v. Railroad Co.*, 61 Miss. 519; but they insist that the rule there laid down is erroneous. Counsel argue that the rule of law announced in those cases is a barbarism of feudal antiquity, when, they say, an employee had little or no legal rights, and was slightly removed above a chattel. And counsel then tells us that this rule of feudal barbarism was first promulgated in *Priestley v. Fowler*, 3 Mees. & W. 1. But a look at *Priestley v. Fowler* shows that case was decided in 1837, more than 150 years after feudalism had been abolished in England, and when not a single serf existed in that country, and when it was the boast of English judges that when a slave put his foot upon English soil he thereby became a freeman. The doctrine pertaining to the relation of master and servants is not the outgrowth of feudalism; it belongs to all ages, and society in its most refined and elevated conditions requires its continuance. Indeed, without this relation we should drift back into barbarism. A perusal of the *Priestley-Fowler Case* will demonstrate the justness of the principles upon which it rests, and those principles have been approved and followed by courts of the highest character and by judges of the greatest distinction. To overrule the several cases of this court holding the doctrine here assailed would not be justified by the facts of this case. The dropping of the iron nut upon the rails of the track was a mere accident, and the least hint from the yard master to the engineer would, doubtless, have brought the engine to

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a safe speed. That the engineer is not a superior agent or officer to the yardmaster is made manifest by the definition of that relation contained in *Evans v. Railway Co.*, 70 Miss. 527, 12 South. 581. And especially may we not overrule the cases of *Railroad Co. v. Hughes* and *Dowell v. Railroad Co.*, since the constitutional convention of 1890, with full knowledge of the doctrine of those cases has, in section 1893 of that instrument, defined the rights between employees and railroad corporations, and has left untouched the rights of the parties in cases like the present.

The argument of counsel that the repeal of the \$100 penalty (chapter 63, Laws 1896) for running locomotives or cars through cities, etc., at a greater rate of speed than six miles an hour, in effect so changes the law as to make the railroad company liable in all cases, in all events, and to all persons, for all damages sustained by any one from the locomotive or cars while they are running at a greater rate of speed than six miles per hour, is in the face of the decision of this court in *Collins v. Railroad Co.*, 77 Miss. 855, 27 South. 837. The argument of counsel, logically followed, would lead to the conclusion that if the injury was inflicted upon an employee of the company while the locomotive was running through a city, or incorporated town or village, at a rate of speed greater than six miles an hour, the company would be liable though the employee wilfully and of his own wrong, and without any negligence of the company, except that of running its locomotive at a greater speed than six miles an hour, should cast himself under the wheels of the locomotive, and so be injured,—a conclusion which would be manifestly absurd. The action of the circuit court is affirmed.

## WHITCHER

v.

BOSTON &amp; M. R. Co.

*(Supreme Court of New Hampshire, Coos, March 16, 1900.)*

[46 Atl. 740.]

**Injury to Conductor Alighting from Train—Negligence—Projecting Ties—Question for Jury.\***—Where a defendant railroad company suffered ties to project a foot beyond the regulation ties, in consequence of which a freight conductor was injured in alighting from his train, the question as to whether or not defendant was negligent was for the jury.

**Same—Same—Cause of Accident—Question for Jury.**—Plaintiff, a freight conductor, alighting from a moving train when there were two

\*As to master's duty to keep roadbed in good condition, see generally, *Louisville & N. R. Co. v. Ross* (Ky.), 17 Am. & Eng. R. Cas., N. S., 432, and *foot-notes*.

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inches of sleet on the ground, struck his foot on some hard object, causing him to slip and fall. The exact spot where his foot touched the ground could not be determined, but a mark made on the rail to indicate the spot where he fell was found to be opposite four ties projecting a foot beyond the regulation ties, and far enough out so that one alighting from a train would step on them. Waybills which he held in his hand, and blood from his injuries, were found on and about the ties. There were no other objects on which he could have stepped. *Held*, that the question as to whether or not the projecting ties were the cause of plaintiff's injury should have been submitted to the jury.

**Same—Contributory Negligence—Question for Jury.**—Defendant railroad company suffered ties, from which it had removed a switch, to project beyond the regulation ties, so that one alighting from a train would step on them. Two years thereafter, plaintiff, a freight conductor, knowing of the switch, and that it had been removed, in alighting from a train moving from four to seven miles an hour, while there were two inches of sleet on the ground, struck his foot over one of the projecting ties, which caused him to slip and fall. He testified that he did not know that the ties projected, though he had frequently stopped at or near them, and it had been his custom to alight at a freight house close by to deposit his waybills, while the train proceeded a short distance to a passenger depot. *Held*, that the question as to whether plaintiff knew of the projecting ties, and was guilty of negligence, should have been submitted to the jury.

**Same—Same—Evidence—Experiments.**—Where defendant railroad company permitted ties to project a foot beyond the regulation ties, whereby a conductor alighting from a train was injured, it was proper to admit the testimony of plaintiff that since the accident he had experimented in stepping from cars at that place, to determine where his feet would naturally come with reference to the long ties.

**Same—Same—Understanding of Injured.**—Where defendant railroad company permitted ties to project a foot beyond the ordinary ties, whereby a conductor alighting from a train was injured, it was proper to permit plaintiff to testify that it was his understanding at the time of the injury that in alighting from a car he would step outside of the ties.

PEASLEE and YOUNG, JJ., dissenting.

Exceptions from Coos county. Action by Edward H. Whitcher against the Boston & Maine Railroad Company for injuries. From a judgment in favor of defendants, plaintiff excepts. Reversed.

Case for injuries to the plaintiff, an employee of the defendants, by their alleged negligence in maintaining unsuitable ties in their yard in Lancaster. Trial by jury. The evidence tended to prove that the plaintiff was 37 years old, and had worked at railroading most of the time since he was 17 years old, as a trackman, as a shop hand, and as a brakeman and conductor on freight trains running in and through the Lancaster yard. Prior to October, 1894, there was a switch in that yard, near the water tank.

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## Whitcher v. Boston &amp; M. R. Co

In the fall of 1894 the switch was removed, but four of the long ties, which projected about a foot further beyond the rail than those used away from switches, were left in place. These ties were about 24 feet from the freight platform. The ends of these ties were more or less uneven, and somewhat raised above the surface of the ground, which at that point was level. There was no other hard substance, aside from the ties, on the ground at that point. These ties were 9 feet long, and the end of the longest one extended 29 inches easterly from the outer edge of the easterly rail. A tie 8 feet long projects 17 inches beyond the rail. The train which the plaintiff had charge of was a freight, but carried passengers. When there were passengers for Lancaster, the train ran past the freight station to the passenger station. One of the plaintiff's duties was to report the train in to the operator at the freight station, and leave his waybills there. It was his custom to jump from the moving train as it passed the freight station, and attend to his duties there while the brakeman attended to the passengers. Before its removal he was familiar with the water-tank switch and its surroundings. He knew, in a general way, that it was removed, but did not remember when, nor that he saw the work while in progress. He frequently passed along the track by those ties, alighted from his train at or near the place where they were, and did more or less work around the freight platform and yard nine times a week. This state of affairs continued until November 24, 1896. It stormed that day, and there were about 2 inches of wet, sleety snow on the ground. The train arrived at Lancaster from the north at about dusk, and was going past the freight station at a speed of from 4 to 7 miles an hour. The plaintiff went to the forward platform of the saloon car, to get off on the right-hand side, but, finding there were cars upon the siding, he changed to the left-hand side. Having his waybills in his left hand, he swung himself to the ground, putting his right foot down first. The instant his foot touched the ground it went out from under him, and he fell and was injured. He testified that the forward part of the foot struck the ground first, upon some hard, slippery substance. He could not tell what it was, as he made no examination of the spot at that time. He does not know it was a tie. The fall was due to slipping, not tripping. It was his impression that his foot came down near the line formed by the plane of the outer surface of the car, extended to the ground, but he could not say certainly. He also testified that he did not know of the existence of the long ties at the time of the accident, and did not understand there were any away from switches, and that he usually got off his train on the right-hand side next the station, and did not think he ever got off on the left-hand side before. The plaintiff testified, subject to the defendants' exception, that since the injury he had made experiments in stepping from the car when at rest, and found that he could step nat-

urally upon a tie that projected 29 inches from the rail; that he did not think there would be any difficulty in doing so if the car was in motion; and that his understanding at the time of the injury was that, in alighting from the car, he would not step upon 8-foot ties, or upon any ties outside of switches. There was evidence that the body of the car projected from 22½ to 24½ inches beyond the outer edge of the rail, and that the hand rail on the side of the car extended 27 inches. The evidence tended to show that the defendants' employees, from observations made shortly after the accident, cut a letter "W" into the rail to mark the place where the plaintiff was injured. Some of the waybills were found near this point. One witness testified that the blood arising from the plaintiff's injury was within a space of 2 or 3 feet in diameter, situated 2 or 3 feet northerly of the long ties. Another witness testified that it was at a point about midway between the rails, and about over the middle of one of the long ties. He could not say whether opposite the point, W, or not. And a third witness testified that it was over one of the long ties, but he could not state which, and that it was opposite the point, W. The plaintiff's theory at the trial was that he stepped on the beveled end of the second long tie, counting from the north, and he claimed that the point, W, was over that tie. A verdict was directed for the defendants, and the plaintiff excepted.

James W. Remick and William H. Pain, for plaintiff.

Drew, Jordan & Buckley, for defendants.

Wallace, J. To entitle the plaintiff to have the case submitted to the determination of a jury, it must appear by some substantial evidence (1) that the defendants were negligent; (2) that their negligence caused the injury; (3) that the plaintiff did not know of the defect complained of, and ought not to have known of it and appreciated the danger from it; and (4) that the plaintiff was in the exercise of due care. If he has failed to sustain any one of these propositions by some substantial evidence, or if the evidence on any one of these propositions is such that fair-minded men can arrive at but one conclusion, and that adverse to him, then the verdict was properly directed for the defendants. The negligence complained of was that the defendants maintained on their main line in the Lancaster railroad yard four ties a foot longer than the regulation ones, all slightly above the ground, and extending so far beyond the rail that their ends were directly in the natural line of the feet of the trainmen, who had occasion, in the discharge of their duty, to jump from or walk or run beside freight trains, and that this rendered the place unsafe for them. The long ties were placed there to support certain switch rails, and when these rails were removed the long ties were suffered to remain, although there was no further occa-

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sion for the extra length, as it now subserved no useful purpose. This was the condition at the time of the accident, and for some time prior thereto. The existence of the ties is admitted, but it is claimed that their presence in the yard was not negligence on the part of the defendants. The defendants were required to furnish to the plaintiff a reasonably safe place in which to perform his duty. They were bound to use reasonable care to see that this place in their yard was in such condition that the plaintiff, who had occasion to use it in the discharge of his duty, could do so with safety, provided that he himself was not negligent. Whether the place was reasonably safe, or was unreasonably obstructed by the ties, would depend upon their location, their character, the extent and kind of work that the railroad employees were required to perform at this point, and its perils in darkness and storm as well as at other times, and whether, considering all the circumstances, the existence of the ties was a source of danger.

We cannot say from the evidence that fair-minded men could draw but one conclusion, and that the defendants were not negligent in suffering the ties to remain in the yard in the manner they did. It was a question of fact for the jury to determine from the evidence, whether the existence of the ties in the roadbed at the time and place of the accident constituted a defect, and whether this was due to the negligence of the defendants. There was evidence that the plaintiff, in getting off the car at the time he was injured, struck his foot on some hard, slippery substance,—he could not tell what,—and that he instantly fell and was injured. There was also evidence

Injury to Conductor Alighting from Train—Negligence—Projecting Ties—Question for Jury.

Same—Cause of Accident—Question for Jury.

that the long ties projected some few inches beyond the outer surface of the car, where he says he put his foot down, and where the foot of a person alighting from the car would naturally come, and that there was no other hard substance at this point. In addition to this, there was evidence that some of the waybills which the plaintiff had in his hand when he got off the train were found near the long ties, and that the marks of blood from the plaintiff's injury, which covered the snow for a space of two or three feet in diameter, were over the long ties and opposite the letter "W" chiseled in the rail to mark the place of the accident by the railroad employees who observed the place that night and the next morning. This evidence supported the plaintiff's contention that the long ties were the cause of his injury. Whether they did thus cause it was a question of fact. That there was other evidence (as, for example, that some of the marks of the blood were two or three feet northerly of the long ties) which, taken in connection with the momentum of the train, supported the defendants' contention that the plaintiff could not have been injured by the ties, does not deprive the plaintiff of the right to have this question submitted to a jury. The determination

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of the controverted fact, whether the negligence complained of was the cause of the plaintiff's injury, involved the weighing of conflicting evidence, the balancing of probabilities, and the drawing of inferences.

The question whether the plaintiff assumed the risk should have been submitted to the jury, unless the evidence is so definite and convincing that fair-minded men could not arrive at opposite conclusions. *Hardy v. Railroad*, 68

Same—Contributory Negligence—Question for Jury.

N. H. 523, 41 Atl. 179. The plaintiff assumed the perils incident to his service of which he was informed, or which ordinary care would have disclosed to him. *Allen v. Railroad Co.*, 69 N. H. 271, 39 Atl. 978. He testified that he did not know of the existence of the long ties at the time of the accident, and did not understand that there were any such ties away from switches. On the question of whether he actually knew of the alleged defect, there was evidence for the consideration of the jury. It would be for them to determine whether his evidence in that respect was true or false. Although the plaintiff was a railroad man of long experience, was very frequently in the Lancaster yard shifting cars, and also frequently walked past the place where the long ties were, yet, considering that he was under no duty to inspect the track or yard to discover defects in them; that his attention had not been called to the long ties since the removal of the switch; that he might presume that the master would, if they were a source of danger, remove them when there was no further occasion for them; that his duties daily took him over many miles of track, and through other yards, to distract his attention; that at the time of the injury it was dark; that the ground was covered with snow; and that he got off upon the opposite side of the train from what he was accustomed to,—it cannot be said that fair-minded men would necessarily come to the conclusion that he must have known of the existence and exact location of the alleged defect, or that he ought to have known of it, at that time and under those circumstances. It was a matter in regard to which different conclusions might be reached.

Another question on which there might reasonably be a difference of opinion was whether, if the plaintiff knew of the existence of the ties, he would appreciate the danger from them. The danger complained of was that they protruded beyond the track to such a distance that they came into the line where the feet of an employee, in alighting from a freight car, or walking or running by its side, would naturally come, and were liable to cause him to trip or slip. The knowledge of the existence of the ties might not disclose to the plaintiff that they were of the exact length to bring them in the line of the feet of any one alighting from or moving beside a car, unless some measurement or comparison was made. The plaintiff would not assume the risk of any danger from the



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long ties from the mere knowledge of their existence unless he appreciated, or ought to have appreciated, that they were a source of danger, or unless the danger was so apparent that a man of ordinary prudence would not have incurred the risk under the circumstances. *Demars v. Manufacturing Co.*, 67 N. H. 404, 406, 40 Atl. 902. The servant might not be required to know of the defect or to appreciate its dangers, when the master would be required to do so, being charged with the duty of inspection and examination. This case is distinguishable from *Allen v. Railroad*, supra. There the employee was injured in broad daylight by an overhead bridge. So far as the bridge itself was concerned, he was ignorant of no fact material to his safety. He had a few minutes before twice passed under the bridge, and stooped each time to avoid being hit by it. So far as the telltale was concerned at the time he was injured, he went upon the top of the car so near the place where the telltale would ordinarily be that it was his duty to use his eyesight to ascertain whether he was inside or outside its location. There it was plain the plaintiff knew and appreciated the danger. Upon the question of whether the plaintiff in the case at bar assumed the risk, there was a chance for a difference of opinion among reasonable men. It cannot be said, as a matter of law, from the evidence, that the plaintiff must have known of the defect complained of, or that he ought to have known of it and appreciated the danger from it. *Demars v. Manufacturing Co.*, supra; *Brown v. Railroad*, 68 N. H. 518, 39 Atl. 581.

It was a question for the jury whether the plaintiff was in the exercise of due care. It was for them to determine whether he was guilty of negligence in getting off the car while it was in motion in the manner he did, in the darkness, with the ground covered with snow. The servant must exercise ordinary care to look after his own safety, but the nature of his employment and its requirements are to be considered in estimating this obligation. It cannot be said that it conclusively appears that a man of ordinary prudence would not have done what the plaintiff did under the same circumstances, and that he was guilty of negligence. Negligence is to be deduced as an inference of fact from the circumstances disclosed by the testimony; and, unless the conclusion that is to be drawn is certain, it is the judgment and experience of the jury, and not of the court, that is appealed to, to determine this question. *Lyman v. Railroad*, 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364; *Demars v. Manufacturing Co.*, supra. The plaintiff was entitled to have the case submitted to the determination of a jury.

The evidence of the plaintiff as to the experiments made by him in stepping from the car since the accident, to determine where his feet would naturally come with reference to the long ties, was properly admitted (*Darling v. Westmoreland*, 52 N. H. 401,

Same—Same—  
Evidence—Ex-  
periments.

Girvin v. New York Cent. & H. R. R. Co

405; Cook v. New Durham, 64 N. H. 419, 13 Atl. 650), as was also his evidence of his understanding at the time of the injury that in alighting from a car he would not step upon 8-feet ties, or any ties outside of switches. Verdict set aside.

Same-Same-  
Understanding  
of Injured.

Chase, J., did not sit. Peaslee and Young, JJ., dissented. The others concurred.

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GIRVIN

v.

NEW YORK CENT. & H. R. R. Co.

(*Court of Appeals of New York, March 26, 1901.*)

[59 N. E. 921.]

**Assault by Brakeman—Liability of Master—Question for Jury.**—In an action for personal injuries, the evidence showed that plaintiff was stealing a ride on defendant's freight train; that he was pursued on the train by a brakeman, and, jumping therefrom, was followed by the brakeman, who jumped from the car on top of him, breaking his leg and otherwise injuring him. *Held*, that the question whether the assault of the brakeman was commenced before he left the car, and was therefore in the line of his employment, so as to render defendant liable, was for the jury.

Appeal from supreme court, appellate division, Fourth department.

Action by William J. Girvin, by Frank E. Wade, his guardian ad litem, against the New York Central & Hudson River Railroad Company. From a judgment of the appellate division (65 N. Y. Supp. 299) reversing a judgment in favor of defendant, entered on a dismissal of the complaint, and an order denying a motion for a new trial, defendant appeals. Affirmed.

A. H. Cowie, for appellant.

William Nottingham, for respondent.

Haight, J. This action was brought to recover damages for a personal injury alleged to have been caused by the negligence of the defendant. The plaintiff was a boy 14 years of age, and, with other boys, was engaged in stealing a ride upon one of the defendant's freight trains. The evidence tends to show that he, with other boys, boarded the train while it was

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\*See *Turley v. Boston & M. R. R. (N. H.)*, 20 Am. & Eng. R. Cas., N. S., 440, and extensive *note*, 442 *et seq.*

## Girvin v. New York Cent. &amp; H. R. R. Co

standing at the station in Solvay, and just as the train was starting he discovered a brakeman coming over a box car on to the flat car occupied by him. The brakeman holloed at him and ran after him. The plaintiff tells us that he ran to the end of the car, jumped onto another flat car, ran across that, and was going to jump onto a box car ahead, but, finding the brakeman had overtaken him and was about to grab him, he jumped from the train, and that as he jumped the brakeman also jumped from the car on top of him, striking him before he reached the ground and broke his leg. He then tells us that the brakeman kicked him, and raised him up and struck him in the face five or six times, and then left him, and jumped back onto the train. The rule of liability governing cases of this character is well stated in the case of *Mott v. Ice Co.*, 73 N. Y. 543. It is that "for the acts of a servant, within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interest, the master will be responsible, whether the act be done negligently, wantonly, or even willfully. \* \* \* But if a servant goes outside of his employment, and without regard to his service, acting maliciously, or in order to effect some purpose of his own, wantonly commits a trespass, or causes damage to another, the master is not responsible." The instant that the train started the duty of the brakeman was upon the train. He undoubtedly acted within the scope of his employment in driving the plaintiff and other boys from the train. If he left the train, and committed an assault upon the plaintiff thereafter, he went outside of his employment, and he alone became liable for his malicious acts and wanton trespass. But in this case we are inclined to the view that the jury might have found that the assault upon the plaintiff commenced on the car before they had left the train. It may be that the brakeman had not, at the time the boy sprang from the car, actually seized hold of him, but the brakeman was pursuing him as fast as he could run, in a threatening manner, with his hands nearly upon him, so that he came in physical contact with him before striking the ground. If the assault was commenced before leaving the car, the brakeman was acting within the scope of his employment, and the defendant became liable for his acts. We think, therefore, that the question was for the jury, and that the nonsuit was properly reversed by the appellate division. The order appealed from should be affirmed, and judgment absolute ordered for the plaintiff on the stipulation, with costs.

Parker, C. J., and O'Brien, Cullen, and Werner, JJ., concur. Landon, J., dissents. Gray, J., not sitting.

Ordered accordingly.

Fleming v. Louisville & N. R. Co

FLEMING

v.

LOUISVILLE & N. R. Co.

(*Supreme Court of Tennessee, Feb. 9, 1901.*)

[61 S. W. 58.]

**Railroads—Injury to Licensees.\***—Where railroad cars are being moved over premises which the public is allowed and accustomed to frequent at any and all times, it is the company's duty to use reasonable care to see that its tracks are clear before moving trains thereon, and a mere failure to observe persons on the tracks will not relieve the company from liability for their injuries.

Appeal from circuit court, Maury county; Sam Holding, Judge.

Action by R. G. Fleming against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. T. Hughes, for appellant.

James A. Smisir, for appellee.

Wilkes, J. This is an action for damages for personal injuries. There was a trial before a jury in the court below, and a verdict and judgment for \$900, and the defendant railroad company has appealed, and assigned errors. The facts, so far as necessary to be stated, are that Fleming was at the depot in Columbia, Tenn., on some business for his employers, who were expecting some shipments by the morning express train. He went upon the tracks of the company to talk to the watchman in the employ of the company, whose duty it was to look after the safety of passengers and other persons at the depot and on the grounds of the company. The watchman was sitting on the steps of a caboose, which was standing on the tracks with several other cars attached, but to which there was no engine attached. Plaintiff was told that the train was late, and he engaged with the watchman in a conversation, and afterwards with another person who came up. In the meantime the watchman had stepped to the telegraph office, only a few feet away, to learn when the train would arrive. The entire space between the tracks—and there were several at this place—was level, and the public generally, as well as passengers, were in the habit of going upon it when it was not

\*See *Morgan v. Wabash R. Co.* (Miss.), 20 Am. & Eng. R. Cas., N. S., 372, and extensive note, 394 *et seq.*

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being used for passing trains, and especially when awaiting the coming of trains. It was more or less crowded all the time by persons standing upon or passing over it. While standing near the caboose, and partially on the track behind it, an engine, which had been engaged in switching, pushed some cars down the track on which the caboose was standing, and they ran against the caboose and standing cars, and they were jammed back, and struck the plaintiff, knocking him down, and rendering him for awhile unconscious. He suffered greatly with his head from the concussion, and for some month or two was wholly disabled from work, and at the time of the trial was still suffering very much from the injury.

It appears that these cars which came down the track and jammed these standing upon it were cut loose from the switch engine, and shunted down the track about 100 yards, and, the track being a down grade, they continued to roll down it of their own momentum, until they struck the standing cars. One brakeman was upon them, and had set one of the brakes, and started to the other, when the accident occurred, but he did not see the plaintiff, and his situation was such that he could not see him. The cars came down the track quite rapidly, and struck the standing cars with force, and pushed them some distance from the track.

There are several objections made to the charge as given, and several to the failure to give several other instructions as requested. The court laid down the rule of law, applicable to the company's duty to a licensee, that it was incumbent on it to keep the walkways, platforms, and standing places reasonably safe for the use of such persons, and proceeded to say that, if a party be a trespasser, it would not prevent him from recovering from the company for injuries negligently inflicted by the railroad company, and which might be averted by using ordinary care and caution by the railroad, but this was true only in cases where the negligence of defendant was the direct and proximate cause of the injury. The insistence of the counsel for the company is that it is not required to anticipate the presence of a trespasser, nor to guard against injury to him, unless his presence is known to the company, and it then failed to use proper care. While, as a general proposition, this may be correct, still it is not applicable in a case where cars are being moved over tracks and yards, and in localities which the public is accustomed to frequent, and where the road may reasonably expect that persons may be in the way of moving trains or cars at any time.

The mere fact that the company was ignorant of the presence of the party, whether licensee or trespasser, would not absolve the company from liability; but the controlling question is whether the company was negligent or not, and that question would depend largely upon the circumstances, the locality, the manner in which the particular place was used, and whether much or little frequented by third persons. If, for instance,

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the company should be pushing its cars along or over crowded streets and passways, it must keep a more vigilant lookout than if it were merely switching at a country station where persons were not accustomed to frequent. A different rule from this would place a premium upon the inattention and failure of the company to see persons who are exposed to danger. While the company, as against a licensee as well as trespassers, is entitled to the use of its tracks when it desires to use them, still when they are not continuously in use, and persons are allowed to go upon them between trains, it would be incumbent upon the road to see that its tracks were clear before moving its trains over them. It appears that the place where this accident occurred had been used as a passing or standing place for a number of years, and was really necessary to be so used for the accommodation of passengers and persons having business at the depot. It does not, therefore, present the case of a person needlessly and heedlessly placing himself in front or rear of a car likely to be moved, and injured because the railroad has no actual knowledge of his presence.

The court, as bearing on this feature of the case, charged that, if plaintiff's negligence was the direct and proximate cause of the injury, he could not recover. The court gave full instructions as to the care required of plaintiff, and the caution he must use to look and listen. We think that the objections to the charge as given and the requests as made are faulty, in that the proper distinction is not made that is raised by the facts of the case, to wit, that the cars were being moved over premises which were frequented by the public at any and all times, and there was a duty resting upon the company to keep a close watch out for persons on or near the track, and this duty made it incumbent on the company to use all reasonable care and diligence to see that its tracks were clear, and a mere failure to see persons on the track would not be sufficient. We think the charge as given was fair and full, and properly presented the case to the jury, and, there being no errors assigned except as to the charge, the judgment of the court below is affirmed, with costs.

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HASIE

v.

ALABAMA &amp; V. RY. CO.

*(Supreme Court of Mississippi, Dec. 3, 1900.)*

[28 So. Rep. 941.]

**Accident on Track—Evidence That Engineer Was Competent.\*—In an action against a railway company for injuries sustained by being struck**

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\*See notes at end of case.

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by its train, defendant may show that the engineer in charge of the train was competent.

**Same—Witnesses—Refreshing Recollection.**—In an action to recover for injuries occasioned by being struck by a train on a bridge, the conductor in charge of the train may refresh his recollection from a report he made on the day of the injury, and state what time the train passed the bridge.

**Same—Opinion Evidence.**—In an action to recover for injuries sustained by being struck by a railway train, the fireman on the train may state that the engineer did all in his power to stop the train after plaintiff was seen on the track, except to sand the track, and, if that had been done, the injury could not have been prevented.

**Same—Contributory Negligence—Instructions.**—In an action against a railway company to recover for injuries sustained by being struck on a bridge, the jury cannot properly be instructed that if they believed the railway company had a contract with a bridge company for the construction of a new bridge, and by its conduct had invited the bridge company's servants to use its old bridge in connection with the work, and plaintiff was injured in going over the old bridge in attendance on his work for the bridge company, he had a right to be on the bridge, and his being thereon was not contributory negligence.

**Same—Same—Same.**—In an action against a railroad company for injuries sustained by being struck by a train on a bridge, the court cannot properly instruct that if plaintiff was on the bridge as the servant of a bridge company, with defendant's knowledge, and the engineer, knowing that the train could not be seen from the bridge, on account of a curve, recklessly ran the train around the curve at such high speed that plaintiff could not escape without being struck, defendant could not defeat his recovery because of contributory negligence.

**Same—Whether Defense of Contributory Negligence a Confession of Negligence.**—In an action to recover for injuries sustained by being struck by a train, the court cannot properly instruct that defendant's defense of contributory negligence is a confession of its negligence as averred by plaintiff.

**Same—Contributory Negligence—Instructions.**—Where, in an action for injuries sustained by being struck by a train on a bridge, defendant avers that plaintiff went on the track, knowing that its train was due, that its train habitually crossed the bridge at full speed, and that the wind was blowing so as to prevent him hearing the train, an instruction that, unless the evidence showed that plaintiff knew all of such facts, defendant's plea of contributory negligence was not proven, is properly refused.

**Same—Evidence—Instructions.**—In an action against a railway company to recover for injuries sustained by being struck on a bridge, an erroneous instruction that if the jury believed that plaintiff, knowing what he was doing, stated just after the accident that no one was to blame but himself, the jury should find for defendant, unless they believed the statement untrue, is cured by a further instruction that such a remark of plaintiff after the accident did not make it so, but the jury should consider all the surrounding circumstances at the time he made the remarks, and determine therefrom what effect to give to the

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declaration, and whose fault was the real cause of the injury, and find their verdict accordingly.

**Same—Contributory Negligence—Instructions.**—In an action against a railway company to recover for injuries occasioned by being struck on a bridge, an instruction on contributory negligence is erroneous, where it requires plaintiff to assume that, if he knew defendant's trains were accustomed to run over the bridge at excessive speed, they would continue to be so run, and, in view of such knowledge, charging him with negligence in going on the bridge without first informing himself that the train had passed over.

Appeal from circuit court, Hinds county; Robert Powell, Judge.

Action by M. S. Hasie against the Alabama & Vicksburg Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

Suit by appellant against appellee to recover damages for personal injuries. On the trial one McElroy, a witness for defendant, and who was the conductor in charge of the train that caused the injury, was permitted to state, over plaintiff's objection, that Mr. Montgomery, who was the engineer in charge of the train, was a competent engineer. Mr. McElroy was permitted, over plaintiff's objection, to refresh his recollection from a report he made of the trip of the train on the day of the injury, and state what time of day the train passed the bridge. The fireman on the train was permitted, over plaintiff's objection, to testify that the engineer did everything in his power to stop the train after plaintiff was seen on the track before it reached him, except sand the track, and that if this had been done the train could not have been stopped in time to prevent the injury. There was evidence to the effect that plaintiff stated immediately after the accident that no one was to blame for it but himself, and he knew the train was due. The second charge given for defendant was as follows: "If the jury believe from the evidence that Hasie, knowing what he was doing, stated just after the accident that he knew that the train was due when he went upon the bridge, and that he had no one to blame but himself, or words to that effect, then the jury will find for the defendant, unless they believe the statement was untrue,—unless the jury further believes that after plaintiff was seen by the defendant's employees on the train the accident could have been prevented." The fourth charge for plaintiff was as follows: "The court instructs the jury that if, immediately after the injury, plaintiff said that nobody but himself was to blame, or words to that effect, this does not of itself make it so; but the jury should consider all the facts and circumstances of the case, and those surrounding plaintiff at the time he said what he did say, and from all the facts and circumstances of the case in evidence the jury must determine what effect to give to said declaration, and also



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three of these matters, then this plea of contributory negligence is not proven, and the jury should find for the plaintiff as to this plea." There were a verdict and a judgment for defendant, from which plaintiff appealed, assigning the following errors: "(1) The court erred in overruling the demurrer to the second plea; (2) in overruling plaintiff's objection to the questions to McElroy as to whether Montgomery was a competent engineer; (3) in overruling plaintiff's objection to questions to Schuford, the fireman, as to what Montgomery could have done; (4) in overruling plaintiff's objection to the question to McElroy as to about when the train passed after looking at report; (5) in granting defendant's first, second, third, and fourth instructions; (6) in refusing plaintiff's first, second, and third instructions." The opinion of the court contains a further statement of the facts.

Green & Green, for appellant.

McWillie & Thompson, for appellee.

Boothe, Special Judge. Appellant brought suit against appellee in the court below to recover damages sustained by a personal injury inflicted by the railway company while appellant was attempting to cross the bridge and trestle of the company across Pearl river, in the city of Jackson, November 21, 1898. The declaration alleges that he was the servant and employee of the Groton Bridge & Manufacturing Company, which, at the time of the injury complained of, was constructing piers for a new bridge for defendant, in close proximity to the bridge then in use, and that the servants of the Groton Company used the railroad bridge as a way to and from their work of construction, and as occasion required, with the knowledge and consent of the resident engineer of the railway company, who was superintending the work in progress; that appellant, the engineer and servant of the Groton Company, was going over said bridge and trestle to perform some duty in respect to said piers when he was struck by the locomotive and train of appellee running at an excessive rate of speed, knocked off the trestle, and permanently injured. To this declaration appellee pleaded the general issue and contributory negligence. To the plea of contributory negligence there was a demurrer, which was overruled, after which issue was taken on same. This demurrer was properly overruled. It appears from the evidence that the train by which appellant was injured was on its way from west to east across Pearl river; that the wind was briskly blowing in the opposite direction; that there was a sharp curve in the railroad track near the bridge; that plaintiff looked back before going on the bridge, but saw and heard no train; that, after going about 50 steps on the trestle leading to the bridge, appellant looked back and saw the train approaching, and at once made an effort to escape from his perilous position, but was knocked or fell off;

## Notes

and that in rounding the curve no whistle was blown and no bell rung to give warning of danger, the air brake in emergency was not applied, no sand was used, and the engine was not reversed. It is also in proof that the servants of the railway company endeavored to stop the train to avert injury, and did all in their power. As to this and the speed of the train there was some conflict.

It is apparent from an examination of the whole record that the questions raised by the pleadings were properly submitted to a jury, and it follows logically that, if there is no error on the part of the learned trial judge, the verdict and judgment ought to be affirmed. We cannot sustain the first, second, third, fourth, and sixth assignments of error.

The fifth assignment of error is that the court erred in granting appellee's first, second, third, and fourth instructions. As to this assignment of error we hold that the second charge was erroneous, but the error is cured by the fourth instruction given for appellant.

The first and fourth instructions are erroneous in this: that the question of contributory negligence in both instructions is predicated upon an untenable hypothesis. In both instructions the plaintiff below, and appellant here, is called upon to assume that, if he knew or had opportunity to know that defendant's trains were accustomed to run over the bridge at an excessive rate of speed, they would continue to be so run; and in view of such knowledge, or opportunity of obtaining same, he is, by the terms of these instructions, chargeable with contributory negligence in going on the bridge "without first informing himself that the train had passed over," is the language of the first instruction; and that he did not "put out or cause to be put out flags or other warnings to notify the train crew that he was on the bridge," is the language of the other. It is not sound doctrine to base a question of so much importance as that of contributory negligence in this case upon the untenable foundation set out in these charges, and call upon the plaintiff to assume that, because the railroad company had been accustomed to violate the law, it would do so the morning of the alleged injury. He had a right to assume, from all the surroundings, that the train would be running at the legal rate of speed. While the jury without these charges might have reached the same conclusion, the charges named were well calculated to mislead them. Because of the errors mentioned, the verdict of the jury is set aside, the judgment of the court below is reversed, and the cause remanded.

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NOTES.

**Admissibility of Evidence to Show Competency of Employees.**—Testimony to show the qualification of a man in charge of an engine which probably inflicted the injury complained of, is not immaterial and irrel-

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evant, upon the question of negligence, to show that the train was run by skilful and careful engineers. *Flynn v. Manhattan R. Co.*, 1 Misc. 188, 48 N. Y. S. R. 670, 20 N. Y. Supp. 652.

**Evidence as to Customary Care or Negligence of Employees.**—See *Missouri, K. & T. Ry. Co. v. Johnson (Tex.)*, 12 Am. & Eng. R. Cas., N. S., 824, and extensive *note*, 828.

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MILLER

v.

WELLINGTON & P. R. Co.

(*Supreme Court of North Carolina, March 12, 1901.*)

[38 S. E. 29.]

**Frightening Horses—Contributory Negligence—Questions of Law.**—Where there is no conflict in the evidence in an action against a railroad company for injuries received by plaintiff's horse becoming frightened by defendant's locomotive, the question of contributory negligence is for the court.

**Same—Same—Same.**—Defendant's train had stopped at its station for a few minutes, with its locomotive standing on a highway crossing, with steam escaping, and blocking about one-third of the highway, when plaintiff attempted to cross in front of it, and his horse became frightened and broke its harness, and plaintiff then jumped from his buggy and was injured. Plaintiff had recently purchased the horse, but did not know that it was safe. *Held* that, as a matter of law, the accident was due to plaintiff's contributory negligence.

**Same—Negligence—Sufficiency of Evidence.\***—The act of a railroad company in stopping a train in front of its station for a few minutes, to transact its business, with its engine standing on the highway and blocking about a third of the way, with the steam escaping, is not negligence which will warrant a recovery by one whose horse is frightened thereby.

Appeal from superior court, Bertie county; Coble, Judge.

Action by W. W. Miller against the Wellington & Powellsville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

F. D. Winston and R. B. Peebles, for appellant.

B. B. Winborne and St. Leon Scull, for appellee.

Cook, J. After introduction of plaintiff's evidence, the defendant moved for judgment as in case of nonsuit, under the statute (Acts 1897, c. 109, as amended by Acts 1899, c. 131).

**Case Stated.** Motion refused, and defendant excepted. Then defendant introduced its evidence, and, after all the evidence was in, renewed its motion, which was again re-

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\*See extensive *note*, 5 Am. & Eng. R. Cas., N. S., 282 *et seq.*

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fused, and defendant again excepted. There were a verdict and a judgment for plaintiff, and defendant appealed.

The contention of plaintiff is that he was injured by the negligence of defendant, in its reckless and careless handling of its engine and train of cars at or near the town of Windsor, in that defendant unnecessarily obstructed the public highway crossing defendant's track for an unreasonable length of time, by allowing its train to remain thereon, and carelessly allowing steam to escape, causing such noises as frightened his horse and unreasonably interfered with the rights of the plaintiff and general public, by reason of which his horse became frightened and ran away with him, throwing him from his buggy and doing him serious injury, causing him much pain, to his great damage, etc. The defendant denies the same, and avers that the injury, if any, was caused by negligence in the careless driving of a wild horse by the plaintiff himself, and that it was not responsible for the same. It appears from all the evidence (there being no material discrepancy in the testimony of the witnesses) that the first question presented for the decision of the court is as to the negligence of the defendant, so that, if the court shall be of the opinion that the injury was caused other than by the defendant's negligence, then it will be unnecessary to consider the defendant's other exceptions.

"When the facts are agreed upon or otherwise appear, what is ordinary care is a question of law, for the court. When the facts are in dispute, it is the duty of the trial judge to explain what would be ordinary care, under certain hypotheses as to facts, and leave the jury to apply the law to the facts as it may find them. In the case at bar the undisputed facts appear in the evidence, so that what constitutes negligence or contributory negligence is a question of law, to be decided by the court, and should not be left to the jury." *Smith v. Railroad Co.*, 64 N. C. 238; *Wallace v. Railroad Co.*, 98 N. C. 494, 4 S. E. 503. In *Pleasants v. Railroad Co.*, 95 N. C. 195, *Merrimon, J.*, delivering the opinion of the court, says: "The counsel for the appellant on the argument insisted that the court ought to have submitted to the jury the question whether or not the plaintiff used due diligence, or, to state it more definitely and appropriately, whether what the plaintiff did or failed to do that was material, as shown by the evidence, constituted negligence or contributory negligence on his part. We think the court ought not to have submitted such a question. It is not the province of the jury to decide such question. In this state what constitutes negligence or reasonable diligence is a question of law, to be decided by the court. The facts appearing, the court decides that there is or is not negligence, or there was or was not due diligence. *Herring v. Railroad Co.*, 32 N. C. 402; *Biles v. Holmes*, 33 N. C. 16; *Heathcock v. Pennington*, Id. 640; *Avera v. Sexton*, 35 N.

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C. 247; Smith v. Railroad Co., 64 N. C. 238; Anderson v. Steamboat Co., Id. 397." Upon the close of plaintiff's evidence, the defendant admitted it to be true, and moved for judgment as of nonsuit; and then, after defendant's evidence was concluded, the motion was renewed. The evidence offered by defendant does not contradict the plaintiff's in any material particular. So the question is one of law. Taking all the evidence of the plaintiff to be true, does it amount to negligence upon the part of the defendant? Or, taking all the evidence submitted, does it establish negligence? The evidence bearing upon the question is as follows:

Oscar Speller said: "This year, in winter time, was date of alleged injury. It was near the depot. I was at the blacksmith shop in front of the depot of the defendant company. The engine was standing about three or four steps from the sidewalk. The ditch is next to the street on the edge of the sidewalk. Measuring that in feet, it would be nine or twelve feet. The sidewalk is about three or four steps wide. From the inner edge of the sidewalk to the engine was about eight steps. That is, from Turner's shop to the engine was about eight steps. The entire street from Turner's shop across to the fence is twenty-four steps. There is a sidewalk on one side, next to Turner's shop; none the other side. The engine blocked up eight steps of the road. I think about one-third of the road was blocked up. That left the balance for a pass-way. There is grass next to the fence on the side away from the engine, where people don't drive. Between the engine and grass there were three or four steps. One would have to pass very close to the pilot (cowcatcher) to get by,—as near as the distance of a little more than a step; not quite two steps. A step is a yard. I saw plaintiff coming by. I saw him coming down the hill. I had heard of his mare being a trotter. The plaintiff came on, and as she got in about two steps of the track she made a spring, and jumped nearly across both the tracks,—the side track and the main line. At the first jump the plaintiff pulled on the reins and the girth broke, and that pulled the buggy up on her, and she continued to run; and when he turned the corner, he fell out or jumped out (I don't know which), and the wheel struck him and knocked him down, and he stayed down. The engine was standing on the side track, on the switch. The engine could have been placed back from the road; could have placed it back as far as they wanted to. I do not know how long the engine had been there. I had been there about half an hour. From the time engine got there until the plaintiff came was ten or fifteen minutes. The engine was standing there when I got there. The engine was making no more noise than usual. The steam was escaping from the safety valve and cylinder cocks. There was not much smoke. The escape of steam from safety valves is a sort of a stewing noise, like it usually does when steam is up. I do not know what frightened the horse, but, from my

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judgment, she got scared of the engine. \* \* \*” Cross-examination: “There was plenty of room to pass. A gentle horse not being afraid of the engine, there was plenty of room for him to pass. She was trotting along a slow gait. There were about four steps clear of the grass. He could have driven out on the grass. Two buggies could have passed, by one driving in the ditch. There were twenty-four steps from one sidewalk to the other. Take eight steps from twenty-four, leaves sixteen steps. When plaintiff came along, he could see the engine as well as I could. I don’t think there would have been any trouble if the girth had not broken. I don’t know which track the engine was on. It was the freight train. There was nothing unusual about the engine. No whistle blew. Nothing but the noise made by escaping steam, as it always makes. All engines make noise when they get steam on them. The warehouse is next to the side track,—the switch. The plaintiff used to be a rapid man with a horse. He used to drive mighty fast.”

W. W. Miller, plaintiff, testified: “On the 2d of January, early in the morning, after I passed engine, it blew off, and horse run, and harness broke. After I found the harness broke, I had no way to do but to make my escape. I knew if I didn’t get out I would be thrown out as it turned the corner. If I hadn’t got out I would have been thrown out. I had driven this horse by there the Wednesday evening before. That time the engine was from the road about thirty steps, and she didn’t show fright. I had passed three times with the engine there. The engine popped off, was the reason my horse took fright. She would not have run but for that locomotive standing there, popping off. \* \* \* My horse got frightened as near the engine as to post [pointed by him some twenty feet],—in about twenty feet of the engine. I was right against the engine side of it when the horse jumped. She went quietly till she got side of the engine, and it popped off and frightened her. I was holding the reins as tight as possible. I didn’t know whether the horse was gentle. I had just had her one week, and had driven her four or five times, and she showed no attempt to run.” Cross-examination: “Robert Burden did not say anything to me about the harness when I bought the horse. Fred Dunstan did not tell me she was a dangerous horse. There was plenty of room to drive, by going close. I thought I could drive by without any trouble. I jumped out of the buggy because I thought I was going to be thrown out and be hurt. \* \* \* If the girth had not broke, I thought I could have held her. I think now that I could. I do not mean to say that they blew the whistle of the engine. The steam was escaping out of the steam cocks,—was what I meant by ‘popping off.’ I don’t know whether the place where they were standing was the place they usually put off and take on freight or not. I thought my harness was a right good driving harness.”

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James Bond testified: "Just as the mare crossed the track she jumped and ran. I thought the escaping steam frightened her. The plaintiff told me that after the girth broke he was afraid to sit in the buggy any longer; said he was afraid she'd kick. She was going a right good gait as she crossed the track. She was running as long as I saw her. After the girth broke, I think I would have done the same thing as plaintiff did. Any prudent man would have done the same as plaintiff did, after the girth broke. The ankle was very much swollen when I saw him at the doctor's office, and he seemed to be suffering great pain." Cross-examination: "I felt certain that the mare would run away and throw him out, when she started to run. \* \* \*"

Whit Lawrence testified: "I am one of the engineers of the defendant company. I remember the morning when the plaintiff's horse passed and ran away. The engine and cars had pulled up there from the river for the conductor to get bills and orders, and for the purpose of passengers getting on the train. I saw the horse after the plaintiff was out of the buggy, and the engine up to that time had not been standing there over four minutes. I was sitting on the right-hand seat when the engine pulled up, and had gotten off to oil up. The business of the company on this return trip did not require the engine to remain there over five or ten minutes. When plaintiff's horse passed, there had not been time to attend to the business of the company. We did not remain there that morning any longer than was necessary to attend to the business of the company. The steam was escaping from the cylinder cocks. The whistle was not blown. It is not safe to have an engine which does not permit the escape of steam through the safety valves and cylinder cocks. It is dangerous to have one that does not permit this." Cross-examination: "There was not room for the engine to stand without coming out there for the passengers to get on. We could have cut the train in two, and pulled across the road, and kept the engine out of the highway. We were on the main track. We could not have cut the train in two without delaying the work, but it could have been done. I don't remember how many freight cars there were. I could have stopped, so far as oiling the machinery went, before we reached the road. When the engine is stopped the cylinder is always reversed. It could be shut off for a little while, but it is not safe. There is danger of bursting the cylinder heads out. The lower the steam, the greater the condensation. It would not have taken but two or three minutes to have backed and recoupled if they had placed part of the train across the road." Redirect examination: "If the engine had been on the other track, it would have been as near the street as it was. We had not had time to cut the engine loose and to have gone further up the track when the plaintiff passed. We did not intend to do it."



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by its train, defendant may show that the engineer in charge of the train was competent.

**Same—Witnesses—Refreshing Recollection.**—In an action to recover for injuries occasioned by being struck by a train on a bridge, the conductor in charge of the train may refresh his recollection from a report he made on the day of the injury, and state what time the train passed the bridge.

**Same—Opinion Evidence.**—In an action to recover for injuries sustained by being struck by a railway train, the fireman on the train may state that the engineer did all in his power to stop the train after plaintiff was seen on the track, except to sand the track, and, if that had been done, the injury could not have been prevented.

**Same—Contributory Negligence—Instructions.**—In an action against a railway company to recover for injuries sustained by being struck on a bridge, the jury cannot properly be instructed that if they believed the railway company had a contract with a bridge company for the construction of a new bridge, and by its conduct had invited the bridge company's servants to use its old bridge in connection with the work, and plaintiff was injured in going over the old bridge in attendance on his work for the bridge company, he had a right to be on the bridge, and his being thereon was not contributory negligence.

**Same—Same—Same.**—In an action against a railroad company for injuries sustained by being struck by a train on a bridge, the court cannot properly instruct that if plaintiff was on the bridge as the servant of a bridge company, with defendant's knowledge, and the engineer, knowing that the train could not be seen from the bridge, on account of a curve, recklessly ran the train around the curve at such high speed that plaintiff could not escape without being struck, defendant could not defeat his recovery because of contributory negligence.

**Same—Whether Defense of Contributory Negligence a Confession of Negligence.**—In an action to recover for injuries sustained by being struck by a train, the court cannot properly instruct that defendant's defense of contributory negligence is a confession of its negligence as averred by plaintiff.

**Same—Contributory Negligence—Instructions.**—Where, in an action for injuries sustained by being struck by a train on a bridge, defendant avers that plaintiff went on the track, knowing that its train was due, that its train habitually crossed the bridge at full speed, and that the wind was blowing so as to prevent him hearing the train, an instruction that, unless the evidence showed that plaintiff knew all of such facts, defendant's plea of contributory negligence was not proven, is properly refused.

**Same—Evidence—Instructions.**—In an action against a railway company to recover for injuries sustained by being struck on a bridge, an erroneous instruction that if the jury believed that plaintiff, knowing what he was doing, stated just after the accident that no one was to blame but himself, the jury should find for defendant, unless they believed the statement untrue, is cured by a further instruction that such a remark of plaintiff after the accident did not make it so, but the jury should consider all the surrounding circumstances at the time he made the remarks, and determine therefrom what effect to give to the

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declaration, and whose fault was the real cause of the injury, and find their verdict accordingly.

**Same—Contributory Negligence—Instructions.**—In an action against a railway company to recover for injuries occasioned by being struck on a bridge, an instruction on contributory negligence is erroneous, where it requires plaintiff to assume that, if he knew defendant's trains were accustomed to run over the bridge at excessive speed, they would continue to be so run, and, in view of such knowledge, charging him with negligence in going on the bridge without first informing himself that the train had passed over.

Appeal from circuit court, Hinds county; Robert Powell, Judge.

Action by M. S. Hasie against the Alabama & Vicksburg Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

Suit by appellant against appellee to recover damages for personal injuries. On the trial one McElroy, a witness for defendant, and who was the conductor in charge of the train that caused the injury, was permitted to state, over plaintiff's objection, that Mr. Montgomery, who was the engineer in charge of the train, was a competent engineer. Mr. McElroy was permitted, over plaintiff's objection, to refresh his recollection from a report he made of the trip of the train on the day of the injury, and state what time of day the train passed the bridge. The fireman on the train was permitted, over plaintiff's objection, to testify that the engineer did everything in his power to stop the train after plaintiff was seen on the track before it reached him, except sand the track, and that if this had been done the train could not have been stopped in time to prevent the injury. There was evidence to the effect that plaintiff stated immediately after the accident that no one was to blame for it but himself, and he knew the train was due. The second charge given for defendant was as follows: "If the jury believe from the evidence that Hasie, knowing what he was doing, stated just after the accident that he knew that the train was due when he went upon the bridge, and that he had no one to blame but himself, or words to that effect, then the jury will find for the defendant, unless they believe the statement was untrue,—unless the jury further believes that after plaintiff was seen by the defendant's employees on the train the accident could have been prevented." The fourth charge for plaintiff was as follows: "The court instructs the jury that if, immediately after the injury, plaintiff said that nobody but himself was to blame, or words to that effect, this does not of itself make it so; but the jury should consider all the facts and circumstances of the case, and those surrounding plaintiff at the time he said what he did say, and from all the facts and circumstances of the case in evidence the jury must determine what effect to give to said declaration, and also

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whose fault was the real cause of the injury, and find their verdict accordingly." The following instructions asked by plaintiff were refused by the court: "(1) If the jury believe from the evidence that the defendant made a contract with Groton Bridge & Manufacturing Company for the construction of piers for a new bridge over Pearl river in close proximity to its bridge, and that in such construction defendant, by its acts and conduct, invited the servants of said Groton Company to use the railroad bridge of defendant as a way for going to and coming from said work, and as occasion required, and that the servants of Groton Company habitually used said bridge under said invitation, to the knowledge of defendant company, and that plaintiff was a servant of said Groton Company, and, at the time of the injury complained of, was going over said bridge to look after said work for said Groton Company, then plaintiff had the right to be on said bridge, and the fact of his being thereon was not contributory negligence on his part; and the defendant owed to plaintiff the duty to exercise due care, under the circumstances, to avoid injuring him, and, if the defendant's engineer failed to do so, it was negligence, for which defendant is liable. (2) If the jury believe from the evidence that plaintiff was using defendant's bridge as a way to the work of the Groton Bridge & Manufacturing Company with the knowledge and consent of defendant, or of its resident engineer in charge of said work for defendant company, and that the engineer of said train had reason to believe that it was probable that some of the servants of the Groton Company might be on said bridge when the bridge might be reached, and that said engineer, knowing that the approach of the locomotive could not be seen from the bridge until it emerged around the curve in the track, and that he recklessly and with gross negligence ran the locomotive and train around said curve at such a high rate of speed as that plaintiff could not, as he was then situated, escape before being struck by the locomotive, then defendant cannot defeat recovery on the ground of contributory negligence. (3) The defense of contributory negligence pleaded by defendant's second plea is a confession of the negligence of the defendant as averred in the declaration, and the averment of the existence of these matters in avoidance: First, that plaintiff well knew that the defendant's train was due and scheduled to cross the bridge at the time he went upon the same; second, that plaintiff knew that defendant's trains habitually crossed said bridge at or about the same time each day, and at the full rate at which the train was running at and immediately before the time complained of; third, that the wind was so blowing as to prevent plaintiff from hearing to advantage the approach of said train,—and that the plaintiff, knowing these three facts, was upon said bridge just preceding the approach of said train. And the court instructs you that, unless the evidence shows to your satisfaction that the plaintiff knew at the time of all

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three of these matters, then this plea of contributory negligence is not proven, and the jury should find for the plaintiff as to this plea." There were a verdict and a judgment for defendant, from which plaintiff appealed, assigning the following errors: "(1) The court erred in overruling the demurrer to the second plea; (2) in overruling plaintiff's objection to the questions to McElroy as to whether Montgomery was a competent engineer; (3) in overruling plaintiff's objection to questions to Schuford, the fireman, as to what Montgomery could have done; (4) in overruling plaintiff's objection to the question to McElroy as to about when the train passed after looking at report; (5) in granting defendant's first, second, third, and fourth instructions; (6) in refusing plaintiff's first, second, and third instructions." The opinion of the court contains a further statement of the facts.

Green & Green, for appellant.

McWillie & Thompson, for appellee.

Boothe, Special Judge. Appellant brought suit against appellee in the court below to recover damages sustained by a personal injury inflicted by the railway company while appellant was attempting to cross the bridge and trestle of the company across Pearl river, in the city of Jackson, November 21, 1898. The declaration alleges that he was the servant and employee of the Groton Bridge & Manufacturing Company, which, at the time of the injury complained of, was constructing piers for a new bridge for defendant, in close proximity to the bridge then in use, and that the servants of the Groton Company used the railroad bridge as a way to and from their work of construction, and as occasion required, with the knowledge and consent of the resident engineer of the railway company, who was superintending the work in progress; that appellant, the engineer and servant of the Groton Company, was going over said bridge and trestle to perform some duty in respect to said piers when he was struck by the locomotive and train of appellee running at an excessive rate of speed, knocked off the trestle, and permanently injured. To this declaration appellee pleaded the general issue and contributory negligence. To the plea of contributory negligence there was a demurrer, which was overruled, after which issue was taken on same. This demurrer was properly overruled. It appears from the evidence that the train by which appellant was injured was on its way from west to east across Pearl river; that the wind was briskly blowing in the opposite direction; that there was a sharp curve in the railroad track near the bridge; that plaintiff looked back before going on the bridge, but saw and heard no train; that, after going about 50 steps on the trestle leading to the bridge, appellant looked back and saw the train approaching, and at once made an effort to escape from his perilous position, but was knocked or fell off;

## Enright v. Pittsburg Junction R. Co

utter disregard for her personal safety. If the testimony was believed—as it must have been—by the jury, the driver was fully aware of the plaintiff's situation, and how she was sustaining herself, and he could not have been ignorant of the fact that she was a child of tender years. Knowing all this, he was at least bound to exercise such care in putting her off as not to endanger her life or limbs. Even trespassers are entitled to humane consideration; but plaintiff's youth exempted her from the charge of being a trespasser, in the legal signification of the word."

The learned counsel for the appellee contends that the facts of this case bring it within the decisions of the court in *Flower v. Railroad Co.*, 69 Pa. St. 210, *Railroad Co. v. Schwindling*, 101 Pa. St. 258, and *Cauley v. Railway Co.*, 95 Pa. St. 398. It is, therefore, necessary to briefly refer to these cases, and see what they decide. In *Flower v. Railroad Co.*, a boy, who was standing on the platform of a water tank, was requested by the fireman, who was acting as temporary engineer, to put in the hose, and turn the water on the engine tank. He climbed up the side of the tender to put in the hose, and as he did so some detached freight cars belonging to the train ran down without any brakeman, and struck the car behind the tender, driving the tender and engine forward. The boy fell from the tender, and was killed. In the opinion of the court, by Mr. Justice Agnew, it is said that the case turned "wholly on the effect of the request of the fireman, who was temporarily engineer, to put in the hose and turn on the water." It was, therefore, held that, it not being in the scope of the engineer's or fireman's employment to ask any one to come on the engine, the defendant was not liable. In *Railroad Co. v. Schwindling* a boy of 5 or 6 years went upon the platform of a railroad station for his own amusement, and, while standing on the edge of the platform, looking at an approaching train, was struck and injured by an iron step which was bent and projected a few inches from the car of a passing train. The boy was told to step back from the position he occupied on the platform, but he refused to do so. Upon the authority of *Gillis v. Railroad Co.*, 59 Pa. St. 141, it was held that under these facts there could be no recovery, and that "the controlling feature of the inquiry in all such cases is, was there a duty to the plaintiff which was violated by the defendant? If there was not, there was no legal liability." We think it apparent that the two cases just referred to do not sustain the contention of the appellee. The facts clearly distinguish them from the one at bar. It must be conceded that *Cauley v. Railway Co.*, supra, supports the position of the appellee. It was before the court twice, and is reported in 95 Pa. St. 398, and 98 Pa. St. 498. Both opinions were written by the same justice, and from both judgments two justices dissented. The opinion in the first report of the case is broader, and goes much further, than the syllabus, in which

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there is nothing that conflicts with the views expressed in this opinion. The second opinion reiterates the views enunciated in the first opinion. We have examined carefully the decisions of this court cited in both opinions, and are convinced that they do not sustain the conclusion of the court on the facts disclosed in the Cauley Case. We do not think the doctrine announced in the opinions filed in that case is supported by reason or authority, and, in so far as it conflicts with the views herein expressed, the case is overruled. It follows that the learned judge of the court below was in error in withdrawing the case from the jury, and hence the assignments of error must be sustained. The judgment is reversed, and a procedendo awarded.

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OSBORNE, COM'R,

v.

WABASH R. CO.

*(Supreme Court of Michigan, March 26, 1901.)*

[85 N. W. 466.]

**Railroad Commission—Rates.\***—Under Act No. 90 of the Public Acts of 1891, providing for fixing the rates for transportation of passengers upon railroads, it is competent for the railroad commissioner, in fixing such rates, to include in the computation the amount of the interstate fares earned by that portion of the road lying within this state.

Application for leave to amend answer granted, and former opinion (82 N. W. 526) affirmed.

Grant, J. In the former decision of this case (82 N. W. 526) we declined to pass upon the federal question, because the record did not show what proportionate part of the receipts from passenger fares was through or interstate fares. The respondent thereupon made application for leave to amend its answer so as to show this fact. On account of the importance of the case, this motion was granted on June 19, 1900, and the answer was amended as follows: "Respondent shows that the amount of interstate fares earned in Michigan during the period covered by said report and included in the computation would reduce its passenger earnings below two thousand dollars per mile." It was further ordered that the case be submitted for decision upon the federal question thus presented by the amended answer and proofs thereunder, which consisted of an affidavit by the auditor of the company. I was aware that an amended answer was permitted, but was not aware of the precise form of the order entered, or that it required an additional opinion on the part of the court. The application

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\*See Northern Pac. Ry. Co. v. Keyes (N. Dak.), 13 Am. & Eng. R. Cas., N. S., 128, and foot-note.

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was not for a rehearing, nor was a rehearing ordered. I suppose the opinion would stand with the federal question included by the amendment of the record, about which there might have been some doubt without such amendment. It was only three days ago that I learned that the parties were waiting for a further opinion in this case. I must, however, assume the responsibility for the delay, as under the order it devolved upon me to examine the question, and write whatever opinion was necessary. In *Louisville & N. R. Co. v. Railroad Commission of Tennessee* (C. C.) 19 Fed. 679, the law was held void for various reasons. The law attempted a direct interference with the rates of interstate commerce. This was held to be beyond the power of the state. The case distinctly recognizes the right to regulate the rates for domestic transportation. In *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244, the attempt was the same, and the court held that regulation between points within the state was valid; but transportation between the states was national in character, and its regulation confined exclusively to congress. In *Carton v. Railroad Co.*, 59 Iowa, 148, 13 N. W. 67, the holding is substantially the same. These cases are a fair illustration of the others cited. The rule is settled beyond controversy that the state cannot regulate rates of fares and freight on interstate commerce. It is equally well settled that it may regulate such rates between points within the state. The law under which relator acted does not attempt to interfere with interstate commerce fares, but only with domestic fares. The question is, in determining what domestic fares shall be, is it competent to include the amount of interstate fares earned by that portion of the road lying within the state of Michigan? Without further discussion, we think this question must be answered in the affirmative. We think the case fairly within the principle laid down in *Home Ins. Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025, and *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994. It is true that those were franchise taxes, imposed upon the right to do business in the state; but the principle enunciated is stated in the following language in *Home Ins. Co. v. New York*: "The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows." So it seems fair and just that in fixing the rate for domestic commerce the earnings of the road in this state by its interstate commerce should be considered. We see no constitutional provision which is thereby violated. It is no interference with the rates which may be fixed by railroads on their interstate business. We see no occasion for reversing our former opinion. The other justices concurred.

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ST. LOUIS, I. M. & S. RY. CO.

v.

STEWART.

(*Supreme Court of Arkansas, Feb. 16, 1901.*)

[61 S. W. 169.]

**Injuries to Passengers—High Speed at Crossing in Village—Instructions.**—In an action for injuries received in a railway accident caused by defendant's engine striking a cow at a highway crossing in a small village, it was not error for the court to refuse to instruct in regard to maintaining gates or keeping a watchman at such crossing, since the statutory immunity from keeping a watch at the crossing did not relieve the company from the exercise of reasonable care.

**Same—Same—Postal Clerks—Negligence—Sufficiency of Evidence.**—Plaintiff, a postal clerk, was injured while in the performance of his duties on defendant's road by the engine and mail car being derailed by striking a cow at a highway crossing in a small village. The train, being late, was running 50 or 60 miles an hour, greatly in excess of the schedule time, which was 33 miles an hour, at a place where the track ran down grade through a cut from 6 to 8 feet deep, and where it made two sharp curves just before reaching the crossing. It was dark, and on account of the curve, an object could not be seen more than 100 feet ahead. The engineer was experienced, and was familiar with this part of the road, and knew of the proximity of the crossing. *Held* sufficient to support a finding of the jury that defendant was negligent in running the train at such a rate of speed at the place of the accident, so as to support a verdict for plaintiff.

**Same—Construction of Foreign Statute.**—In an action for injuries received in a railroad accident in Missouri, after having proven the statute law of Missouri in regard to cattle guards, it was not error for the trial court to refuse to permit a witness to testify as to the construction placed on said statute by the supreme court of that state; the best evidence being the reported decision of the court.

**Same—Evidence—Compromise with Person Having Similar Claim.\***—In an action for injuries received in a railroad accident, evidence that the railway company had settled with another passenger injured in the same accident, though improperly admitted, was not reversible error, where there was evidence establishing the defendant's negligence.

Appeal from circuit court, Nevada county; Joel D. Conway, Judge.

Action by Henry H. Stewart against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of the plaintiff, the defendant appeals. Affirmed.

Dodge & Johnson, for appellant.

Scott & Jones, for appellee.

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\*See notes at end of case.



## St. Louis, etc., Ry. Co. v. Stewart

Bunn, C. J. The appellee, Henry H. Stewart, was in the employ of the United States government as a postal clerk, and in the performance of his duties as such was a passenger

in the mail coach of defendant's passenger train on the 5th of February, 1898, going north from Texarkana to St. Louis; and when the train reached the little town of Hematite, about 35 or 40 miles south of St. Louis, the train was wrecked, and the appellee was injured by receiving a cut an inch long and to the bone on the left side of the head, a contusion on the left thigh; wherefrom he suffered from nervous shock, and was unable to perform his customary duties for 20 or 30 days, thus losing \$100, and paid out for medical attendance \$13, and some other small amounts. The circumstances of the wreck were substantially as follows, viz.: The train was running at the rate of 50 or 60 miles an hour, greatly in excess of the schedule time, which was 33 miles an hour, it being some minutes behind time, and the trainmen in charge were endeavoring to make up the time. It was about 6 o'clock a. m., which was, at that season of the year, dark. For the distance of 1,000 or 1,200 feet before reaching the street or public crossing at Hematite there were curves in the railroad track, forming the letter "S" (that is, two curves), and the track was in a cut from 6 to 8 feet deep (about 6 feet deep towards the highway crossing and up to it). The engine struck a passing cow on the highway, and was thus thrown from the track, as were the tender and several of the coaches following, among them the mail coach in which the appellee was traveling and was at his usual work at the time. The mail coach was turned over on its side, and the appellee was thus injured. It is in evidence that one occupying the engineer's place could see a cow only a short distance ahead, owing to the curves and the depth of the cut. It was also shown that in the nighttime, when the headlight had to be depended on, on account of the curvature of the roadbed, and the consequent diversion of the rays of the headlight from the track, a cow could not be seen further than 100 feet in front of the engine. The railroad bed, the cattle guards on either side the highway, and the wire fences leading therefrom, and the train, with its running gear and appliances, were all in perfect condition. Both the engineer and fireman were instantly killed. The statutes of Missouri regarding cattle guards and track fencing, as affects this case, are not materially different from the laws of this state.

The main question in the case is, were the employees of defendant guilty of negligence in operating the train at the time of the injury complained of? All the statutory signals had been given, and the stock signals required by the regulations of the company had also been given. But was all this sufficient under the circumstances of this case? There was no apparent necessity to keep a watchman or guard at this crossing.

Injuries to Passengers—High Speed at Crossing in Village—Instructions.

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Hematite is but a very small village, and it may be admitted, for the sake of the argument, that the crossing was little different from such a crossing in the country. But this immunity from keeping a watch at the crossing does not relieve a railroad company from the exercise of such care as it reasonably can to prevent occurrences such as this one is shown to have been. Therefore there was no necessity for an instruction on the subject of gates and watchmen. It was shown that both the engineer and fireman were experienced in their stations, and the engineer especially was regarded as one of the finest engineers on the road. Both were acquainted with this part and all parts of the road, as they had been employed for some time in running on these trains. Was it prudent, or in the exercise of due care, for this engineer, with his knowledge of the surroundings, to run his train at this particular point at the rate of 50 or 60 miles per hour, when only required by the schedule to run 33 miles per hour? The necessity of making up lost time is never so great as that of preserving human life; and, even when the making up lost time approaches necessity itself, the necessary increase of speed should be on parts of a road where a strict lookout will be reasonably effective in preventing injuries, or at least the probability of injury, to persons and property. From the evidence, the portion of the track involved was peculiarly trying to trainmen, and some things which would have greatly aided them in the successful running of the train on other portions of the track were absent at this place,—a straight track, and perfectly level grade, or grade that would insure a quicker stoppage of the train than on a down grade, as this was. It appears to us—as it evidently did to the jury—that, without having to resort to anything that would have rendered the service of the road to the public less effective, or to the company less remunerative, a far less rate of speed would have been the proper thing in this instance. At the time of the collision the train was running at a rate of nearly a mile a minute. To run the 100 feet, which was the greatest distance the engineer could have observed the cow, required little more than a second of time. A strict lookout, as required by law, and the application of the most effective means known to slow up or stop the train, could not possibly avail anything. No effective alarm could have been given in that moment of time. These things should have been taken into account by the engineer.

On the subject of the degree of care necessary under such circumstances the court gave, at the instance of the plaintiff, instruction No. 6, and, at the instance of the defendant, instructions Nos. 8 and 12, which, taken together, or even separately, fairly define what is the law applicable, as held by this court in all its decisions on the subject. *Railroad Co. v. Miles*, 40 Ark. 298; *Railway Co. v. Timmons*, 51 Ark. 459, 11 S. W.

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690; Railway Co. v. Sweet, 57 Ark. 287, 21 S. W. 587; Id., 60 Ark. 550, 31 S. W. 571; George v. Railway Co., 34 Ark. 61. These instructions, in their order, are as follows: For the plaintiff, No. 6: "Railroad companies, in the carriage of passengers, are required to use the utmost care and foresight, and are held responsible for the slightest negligence. The first and most important duty incumbent on them is to provide for the safety of their passengers. To this end they are required to provide all things necessary to their security reasonably consistent with their business, and appropriate the means of conveyance employed by them, and to exercise the highest degree of practicable care, diligence, and skill in the operation of their trains." For the defendant, No. 8: "The court instructs the jury that, while the law demands the utmost care for the safety of passengers, it does not require railroad companies to exercise all the care, skill, and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible perils. The plaintiff in this case necessarily took upon himself all the usual and ordinary perils of travel; and if they find from the evidence that defendant had exercised all the care, skill, and diligence required by law, as defined in these instructions, and that, nevertheless, the accident occurred, the defendant would not be responsible therefor, and your verdict should be for defendant." And No. 12: "The care required by railroad carriers has been defined to be the highest practicable care which capable and faithful railroad men would exercise in similar circumstances."

Same—Construction of Foreign Statute.

It was objected by the defendant that, having proven what was the statute law of Missouri on the subject of cattle guards and fencing, and the liability and immunity therein declared, the court refused to permit the witness Ewing to testify as to the construction put upon said statute by the supreme court of that state. We see no error in this refusal. The best evidence of what the supreme court of Missouri has said on the subject is the report of its decisions, which are easily accessible, even admitting this is a matter of proof at all.

In the course of the examination of witnesses, one witness, who we infer had been injured in the same wreck, or claimed to be, was asked if the railroad had settled with him; to which he answered in the affirmative. To the

Same—Evidence—Compromise with Person Having Similar Claim.

asking of and the answer to the question the defendant objected, but the court overruled its objection. There was error in this, but, in view of the particular point at issue, and the proof sustaining the plaintiff's contention,—negligence,—and for other reasons, the error is not a reversible error.

There is some question as to the amount of damages. Further than the loss of wages by the loss of time, the medical bill, etc., this court has no certain evidence in the case.

Notes

Pain and suffering, as elements of damage, are uncertain quantities, both for the jury and the court. We will not disturb the verdict in this particular case. Affirmed.

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NOTES.

**Admissibility of Evidence of Compromise with Persons Having Similar Claims.**—In an action against a railroad company for damages resulting from a fire started by sparks from defendant's engine, evidence is admissible to show that defendant paid third parties for damages resulting to their property from the same fire, as the proof of such fact would tend to show an admission on the part of defendant that the fire resulted from its own negligence. *Galveston, H. & S. A. Ry. Co. v. Hertzig* (Tex. Civ. App.), 12 Am. & Eng. R. Cas., N. S., 846.

But in *Missouri, K. & T. Ry. Co. v. Fulmore* (Tex. Civ. App.), 29 S. W. Rep. 688, it was held that such evidence, standing alone, was not sufficient to establish negligence on the part of defendant.

And in *Slingerland v. Norton*, 58 Hun 578, 12 N. Y. Supp. 647, it was held that such evidence should be excluded under the rule that evidence to show attempts to settle out of court will not be received as admissions of liability.

In an action under S. Car. Gen. St., § 1511, to recover damages for personal property destroyed by fire beyond defendant's right of way, testimony is inadmissible to prove that defendant had paid for cotton burned at the same time, which had been received by the company for carriage. *Thompson v. Richmond & D. R. Co.*, 24 S. Car. 366.

Where a municipality is sued for injury to a carriage, caused by a defective street, plaintiff may show that defendant has paid damages for injuries caused by the same accident to a passenger in the carriage. *Grimes v. Keene*, 52 N. H. 330.

But a request, made by the payer of a disputed claim that the payee will not disclose the settlement, is not competent evidence of the payer's admission of liability. *Gault v. Concord R. Co.*, 63 N. H. 356.

**Offers to Arbitrate or Settle.**—A railroad company does not admit liability by making an offer to arbitrate a claim for negligence. *Mundhenk v. Central Iowa R. Co.*, 57 Iowa 718, 11 N. W. Rep. 656, 11 Am. & Eng. R. Cas. 463.

A party has a right to buy peace rather than litigate for it. So proof that a railroad company has offered a certain sum before suit in satisfaction of a claim for damages against it, is not an acknowledgment of damages to the amount offered. *Waldrop v. Greenwood, L. & S. R. Co.*, 34 Am. & Eng. R. Cas. 204, 28 S. Car. 157, 5 S. E. Rep. 471.

Such an offer by the president of the company is not an admission of liability, though it is made after the president has investigated the matter. *Payne v. Forty-Second St. & G. S. F. R. Co.*, 8 J. & S. (N. Y.) 8. See also, *Chicago, etc., R. Co. v. Roberts* (Colo.), 15 Am. & Eng. R. Cas. N. S., 572, and *foot-note*.

now actually occupied by the roadbed and telegraph line may be only a small part of the four hundred feet granted, but this fact is of no consequence. The company may at some time want to use more land for side tracks or other purposes, and it is entitled to have the land clear and unobstructed whenever it shall have occasion to do so." In *Olcott v. Supervisors*, 83 U. S. 678, 21 L. Ed. 382, the United States supreme court says: "That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a state's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly, it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals when they obtain the power to construct it from legislative grant. It would be useless to cite the numerous decisions to this effect which have been made in the state courts. \* \* \* It is said that railroads are not public highways per se; that they are only declared such by the decisions of the courts; and that they have been declared public only with respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of courts to make them such. True, they must be used in their peculiar manner, and under certain restrictions, but they are facilities for passage and transportation afforded to the public, of which the public has a right to avail itself. As well might it be said a turnpike is a highway, only because declared such by judicial decision. A railroad built by a state no one claims would be anything else than a public highway, justifying taxation for its construction and maintenance, though it could be no more open to public use than is a road built and owned by a corporation; yet it is the purpose and the uses of a work which determine its character." In *Venable v. Railway Co.*, 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68, it was held that a conveyance to a railroad company of a right of way through the grantor's land is a dedication to the public. In the court opinion it is said: "There can be no doubt from the text books and adjudications that, where a railroad is empowered, as in the present instance, to condemn land for a public use,

it occupies in all respects the same footing as any other corporation or quasi corporation, municipal or otherwise, or governmental agency, when exercising similar authority, to obtain land for a market place, for a street, highway, jail, or court house." In *Railroad Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578, the court had under consideration the congressional railroad right of way grant above referred to. "The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation other lands are given, but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route. The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands from this circumstance it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists. \* \* \* We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road." Jones on Easement lays down the rule that the prescriptive right to a passageway along the track or right of way of a railroad cannot be acquired by the public, or by individuals, while the railroad is constantly using a single track over such right of way. The construction and operation of one track on its location is an assertion of right to the entire width of its right of way. The presence of one track, constantly in use, is a definite badge of ownership, and the only practical assertion of title that can be made. If the public has used paths by the side of the railroad track for any length of time, the use must be considered as permissive, and not adverse; citing a long list of authorities from different states. Jones, *Easem.* p. 232, §§ 2, 81. Individuals may intrude upon or obstruct the public thoroughfare, but cannot acquire title by prescription to such lands. *Orena v. City of Santa Barbara*, 91 Cal. 631, 28 Pac. 268; *Hoadley v. City and County of San Francisco*, 50 Cal. 265; *City of Visalia v. Jacob*, 65 Cal. 435, 4 Pac. 433; *People v. Pope*, 53 Cal. 450; *City and County of San Francisco v. Bradbury*, 92 Cal. 414, 28 Pac. 803; *Archer v. Salinas City*, 93 Cal. 51, 28 Pac. 839, 16 L. R. A. 145.

2. Respondents' counsel contend that, "if the appellant can maintain the present action [ejectment] at all then the plea of the bar of the statute is good." And he cites in support of this contention *Allen v. McKay*, 120 Cal. 332, 52 Pac. 828, wherein it is claimed the court held that, if the title to the lands in ques-

tion was such as to found thereon an action to recover the possession of the same, such title may be lost by adverse possession. That was an action to recover possession of a tract of land in Humboldt county covered by the waters of Humboldt Bay, and the court says: "If the land in controversy was not private property, plaintiffs had no title. If it was private property, there certainly could be an adverse occupancy of it for the statutory period." The difference between that and this is that the contest there was in reference to the ownership and possession of private property. Here, as already shown, the premises in question were granted for, and dedicated to, a public use. There is but one form of civil action in this state. The substance of the action determines its character. Being entitled to the possession of the premises in question as a part of the railroad right of way under the congressional grant for the purposes therein specified, and the defendants having intruded thereupon and withholding the same, the plaintiff has a right to recover the possession thereof by any appropriate action; and whether that action be called "ejectment," or by any other name, is quite immaterial. *Railroad Co. v. Benity*, 5 Sawy. 118, Fed. Cas. No. 2,551, was an action in ejectment by the railroad company against the defendant therein for a portion of the railroad right of way acquired under the grant in question. The court there says: "If the plaintiff is entitled to actual possession of the land for the purpose of effecting the object in view when the right of way was granted, it can recover such possession in some judicial proceeding. The mere form of the action has ceased to be of any importance in this court. There is now but one form of all common-law actions. \* \* \* We think this complaint does state a good case. It may be admitted that for the obstruction of a mere easement the recovery of the possession of the land itself would not be the proper remedy. But, in order that the plaintiff in the case at bar may make such use of the land as the grantor intended it should under the grant of a right of way, it becomes necessary to take and keep an actual possession of the land." *Southern Pac. Co. v. Burr*, supra, was also an action at law to recover possession of a portion of the railroad right of way in question. As already shown, the court held that that action was not only maintainable, but that the statute of limitation did not run against the right of the plaintiff therein. *City of Visalia v. Jacob*, supra, was also an action of ejectment, and the court in passing says: "An action of ejectment may be maintained by a municipal corporation for the recovery of the possession of a street wrongfully possessed by an individual, whether the corporation owns the fee or the adjoining proprietor retains it. In the latter case the right of a municipality to regulate the public use, and, for that purpose, to possess, use, and control the property, is treated by the court as a legal, and not merely an equitable, right,"—citing author-

## Appleby v. South Carolina &amp; G. R. Co

ities; and adding: "But it does not follow that such an action is barred by an adverse possession for a statutory period;" and referring to *City and County of San Francisco v. Calderwood*, 31 Cal. 589, where it seems to have been held that ejectment would be barred, the court says: "But in that case it was found that the 'slip' had never been dedicated to the public use,"—referring, as against that case, to *Hoadley v. City and County of San Francisco* and *People v. Pope*, *supra*. *City and County of San Francisco v. Bradbury*, *supra*, was ejectment to recover the possession of an engine lot reserved to the city under the Van Ness ordinance. See, also, the later case of *City and County of San Francisco v. Grote*, 120 Cal. 60, 52 Pac. 127, 41 L. R. A. 335. For the reasons stated, the judgment must be reversed; and it is so ordered.

We concur: Garoutte, J.; Harrison, J.

APPLEBY *et al.*

v.

## SOUTH CAROLINA &amp; G. R. Co.

(*Supreme Court of South Carolina, March 28, 1901.*)

[38 S. E. 237.]

**Injury to Passenger—Wantonness—Backing Train—Exemplary Damages—Pleading.**—Plaintiff's husband placed her on defendant's train, requesting the conductor to inform her when the train reached a certain station, and assist her to alight there. The train arrived at that station after dark, made a very short stop, and moved on with plaintiff on board. Some one informed the conductor that there was a lady on board who desired to leave the train at that station, and the train was stopped about 100 yards from the station. When the train stopped, one of the brakemen approached plaintiff to assist her to alight, and as she was proceeding to the door to leave the coach the engineer negligently and wantonly caused the train to back suddenly, throwing plaintiff against the door, and injuring her. *Held*, that a statement of such facts in a complaint entitled plaintiff to actual and exemplary damages.

**Same—Same—Same.\***—Where a passenger receives injuries caused by the recklessness and carelessness of an engineer in suddenly backing the train as a passenger is preparing to alight, the jury is justified in awarding exemplary damages.

**Same—Same—Sufficiency of Evidence.**—Evidence that, after a train had been brought to a stop to allow a passenger who had been taken past a station to alight, the engineer backed the train so forcibly as to seriously injure the passenger by throwing her against the car door, is

\*See *Gillman v. Florida Cent. & P. R. Co.* (S. Car.), 12 Am. & Eng. R. Cas., N. S., 125, and *note*, 130 *et seq.*



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sufficient to justify the jury in finding that the engineer was wantonly reckless, and awarding the passenger exemplary damages on that ground.

**Duty to Passenger Alighting from Train—Exemplary Damages for Injury to Passenger.**—A railroad company is bound to provide reasonable means of protection so as to insure the safety of passengers while boarding and alighting from its cars, and a reckless disregard of such duty renders it liable in exemplary damages to a person injured thereby.

Appeal from common pleas circuit court of Charleston county; Ernest Gary, Judge.

Action by Mary K. Appleby and another against the South Carolina & Georgia Railroad Company. From a judgment in favor of the plaintiffs, defendant appeals. Affirmed.

B. L. Abney and Jos. W. Barnwell, for appellant.

Leager & Holman and J. B. Larissey, for respondents.

Pope, J. This action came on for trial before Judge Ernest Gary and a jury. The plaintiff Mary K. Appleby has united with her husband, Peter R. Appleby, "as required by law in such cases made and provided." She demands

**Case Stated.**

a judgment against the defendant for \$15,000. Her complaint, omitting the first article, alleging incorporation of defendant, is as follows: "Second. That on the 24th day of December, 1898, the plaintiffs named, for a valuable consideration, purchased a first-class ticket over the line of defendant company for transportation as a passenger from Charleston, S. C., to Reevesville, a station on the line of defendant's road between the city of Charleston and Branchville, S. C.; that the husband of the said Mary K. Appleby conducted her on board of one of the passenger coaches of defendant attached to one of its passenger trains, scheduled to leave the city of Charleston at 5:30 p. m. on said day; that the husband of the said Mary K. Appleby informed the conductor in charge of said train that his wife was on board thereof, and designated the coach on which she was seated, and requested said conductor to see that she was put off said train at Reevesville, the place of her destination. Third. That upon the arrival of said train at Reevesville the conductor in charge of the same carelessly and negligently omitted to inform the said Mary K. Appleby of the arrival of said train at said station; that the aforesaid train arrived at Reevesville after dark, and only made a very short stop, and almost immediately moved off from said station, with the said Mary K. Appleby on board of the same; that a passenger on board said train informed the said conductor that there was a lady on board of the said train who desired to leave the same at Reevesville, and thereupon the said train came to a stop after passing said station 100 yards or more. Fourth. That, upon said train coming to a stop, one of the brakemen on duty of same approached the said Mary K. Appleby for the purpose of assisting her to alight

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therefrom, and that, as she was proceeding to the door of the coach to leave same, the engineer in charge of the locomotive attached to and drawing said train negligently, carelessly, and wantonly caused said train to back suddenly and with great force, and that by reason thereof the said Mary K. Appleby was thrown with great violence and force against the door of the coach, which she was approaching to make her exit from said train, and that in consequence of the force involved with which she was thrown forward against the door of said coach the middle finger on the left hand of the said Mary K. Appleby was broken, and that she received internal injuries in consequence thereof. Fifth. That by reason of the injuries so received the said Mary K. Appleby suffered, and still continues to suffer, pain and mental anguish; that her health has been seriously and permanently impaired, to her great damage fifteen thousand dollars." The defendant entered a general denial. Both sides introduced testimony. Both sides made requests to charge. No exceptions were made to the testimony offered. After the judge's charge, the jury rendered a verdict for the plaintiffs in the sum of \$10,000, but on motion for a new trial the circuit judge required the plaintiffs to remit all the verdict except the sum of \$7,500, which the plaintiffs did. Then the defendant appealed from the judgment on the verdict, and alleged as its grounds of appeal the following: "(1) It is respectfully submitted that his honor, the presiding judge, erred in instructing the jury, as requested by plaintiffs, 'that the allegations of the complaint alleged facts appropriate to two causes of action,—one for actual damages, and the other for vindictive, punitive, exemplary damages,'—whereas it is respectfully submitted that there are no allegations in said complaint from which the jury would be warranted in finding that the defendant was guilty of negligence sufficient to find a verdict for vindictive, punitive, or exemplary damages. (2) It is respectfully submitted that his honor, the presiding judge, erred in charging the jury, as requested by the plaintiffs, 'that, if a passenger on board a railroad train is in the act of leaving its cars at a place of destination, and the railroad, through its servants and agents in charge thereof, without warning to such passenger, recklessly and carelessly causes the engine attached to said cars to be thrown against the same, whereby a passenger is injured in person by being thrown against the cars, then the jury would be justified in law in awarding vindictive or punitive damages for personal injuries so received'; when, it is respectfully submitted, the only allegation in the complaint referring to or purporting to refer to punitive damages is to the effect 'that the engineer in charge of the locomotive attached to and drawing said train negligently, carelessly, and wantonly caused said train to back suddenly and with great force,' and there is no evidence whatever from which the jury could infer wantonness on the part of the engineer. (3) It is respectfully submitted that,

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the only allegation charging or purporting to charge that the defendant was guilty of negligence for which punitive or exemplary damages could be recovered being the allegation that the engineer was guilty of wanton negligence in backing the cars, and there being no evidence whatever produced from which the jury could infer wantonness on the part of the engineer, his honor erred in submitting the question whether or not the defendant was guilty of negligence arising from wantonness, willfulness, and vindictiveness. (4) It is respectfully submitted that his honor, the presiding judge, erred in instructing the jury 'that it is a duty of a railroad company to provide reasonable means of protection so as to insure the safety of passengers while boarding and alighting from its cars,' as requested by plaintiffs in their second request, whereas it is respectfully submitted that a railroad company, although held to the highest degree of care, is not bound to adopt appliances, reasonable or otherwise, which will insure the safety of passengers."

In the consideration of a judge's charge, under exceptions thereto, it is always well to keep in mind the facts which had been in testimony, for it is always to be expected that a judge will charge the law applicable to certain facts; otherwise, he is dealing in abstract law. While a judge is, by our constitution, denied the privilege of giving a statement of the evidence, still he is not denied the privilege of having the facts of a particular cause in his mind. Let us briefly state what the facts were as testified to by plaintiffs' witnesses. On the 24th December, 1898, at about 5½ o'clock in the afternoon, the plaintiff Mrs. Mary K. Appleby, under the care of her husband, Mr. Peter R. Appleby, after having purchased and paid for a first-class ticket on the defendant's train from Charleston, S. C., to Reevesville, S. C., both stations on the line of defendant's railroad, entered the first-class car attached to the train of said defendant, which was to leave the city of Charleston on its way to the city of Columbia, S. C.; on that day; and, after being seated, Mr. Appleby notified his wife that he would go out to see the conductor of that train, so as to request him to look after his said wife, and assist her to leave the said train when it reached Reevesville. He did see the conductor, who assured him that he would assist his wife to leave the train at Reevesville. This assurance of the conductor was conveyed to Mrs. Appleby by her husband. It was quite dark when the defendant's said train reached Reevesville. The station was announced by the railroad officials when Reevesville was reached, and Mrs. Appleby heard the announcement, and saw other passengers leaving the car at that station. She said she asked a gentleman who was leaving the train in company with his wife to assist her with her satchel and bundles, but he turned to her, showing that his arms were already full of bundles, and then he told her that he would send the conductor back to help her. Before the conductor or any other official

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reached her, the train was put in motion. Some gentleman said that there was a lady on the train who wished to get off at that station. Thereupon the moving train was stopped, and one of the railroad officials approached Mrs. Appleby, asking if she wished to leave the coach at that station. Upon her assurance that she did so wish, the said official took up her bag, and asked her to go forward; he following immediately after her. When Mrs. Appleby was near the car door, which was ajar, she was thrown with great violence against the door, by the sudden, unannounced movement of the train with great violence, and thereby her finger was crushed and internal injuries inflicted upon her. So great was her pain thus suddenly inflicted that the trainman accompanying her with her baggage begged her to take a seat, and he went out, and the conductor and ticket-office keeper came, and, with one on each side of her, carried her out of the train, and the ticket agent accompanied her to the house of the family she came to visit. She suffered so much that her friends insisted that she should return to Charleston for medical aid, and this she did. Her family physician came to her, and described her internal injuries as serious. The said physician had been attending her off and on ever since her return to the city of Charleston. His bill for his services at one time amounted to \$25, which was paid to him, and other bills have been made and paid. Besides, she is rendered unable to attend to the ordinary duties as mistress of her husband's home. Now, these facts were in the mind of the circuit judge when he made his charge. His charge was as follows, in part: "Now, when a passenger buys a ticket, and enters a passenger train of the railroad company or common carrier, the duties are reciprocal; each has a duty to perform. The railroad company undertakes to carry him safely to his place of destination, and to land him, and, landing him, the law imposes upon it the duty of stopping at a sufficiently suitable place and for a sufficient length of time to enable him to alight in safety. Now, the duty upon the part of the passenger is that in alighting, and in traveling upon the coach of the defendant, the railroad company, he shall use all ordinary care to avoid accidents or injuries to himself. Those are the two duties. The railroad company undertakes to carry and land him in safety,—that is its contract,—and to use the highest degree of care in so doing. The passenger agrees to use ordinary care in protecting himself from injuries and accidents while either going to the place or alighting from the train. Now, the charge is here, as you observe, that the railroad company stopped at the place, and when the passenger undertook to alight it is contended that they backed the car, and the engineer backed the car with such violence and force as to cause injury to the plaintiff. That is denied by the railroad company. Now, if you should find that the railroad company was negligent in the manner in which it undertook to alight this passenger, or in

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the manner in which it stopped to enable the passenger to alight, then I charge you that the railroad company would be liable to compensate the passenger in whatever damages she sustained. But if, on the contrary, you find that she, in alighting, did not use ordinary care to prevent accident or an injury to herself, then, though the railroad company should have been negligent, she could not recover in this accident, because, as I have already undertaken to explain to you, each owes a duty to the other; in other words, a passenger has no right to get up on top of a train to perform athletic feats, but he must observe ordinary care, prudence, and caution in protecting himself from injury or from harm. Now, I have been requested by the plaintiffs' counsel to charge you certain propositions of law, which I will proceed to do: 'The jury is instructed that the complaint herein alleges facts appropriate to two causes of action; one for actual damages, and the other for vindictive, punitive, or exemplary damages.' That is true. That is the allegation of the complaint. Second. 'The jury is instructed that it is the duty of the railroad company to provide reasonable means of protection so as to insure the safety of the passengers while boarding and alighting from its cars, and that a wanton or reckless disregard of such duty would render a railroad liable in exemplary damage to a person so injured.' That I charge you to be the law. Third. 'The jury is instructed that it is the duty of a railroad company to stop its cars at the destination of passengers along its line of road, and to allow such passengers a reasonable time at the station in which to leave its cars.' That I charge you as I have already undertaken to explain to you to be the law. Fourth. 'The jury is instructed that punitive or vindictive damages may be awarded by way of punishment where the legal rights of one person have been invaded through the wanton, willful, or reckless disregard of such rights by some other person or corporation, and injuries resulting therefrom.' This I charge you to be the law. Fifth. 'The jury is instructed, if a passenger on board a railroad train is in the act of leaving its cars at a place of destination, and the railroad, through its servants and agents in charge thereof, without warning to such passenger, recklessly and carelessly causes the engine attached to said car to be thrown against the same suddenly, whereby a passenger is injured in person by being thrown against the cars, then the jury would be justified in law in awarding vindictive or punitive damages for personal injuries so received.' That I charge you. I desire to explain to you further what exemplary or punitive damages are. It is different from actual damages. Actual damages is where you compensate a person for the damage he has actually received; but if you find the injuries have been the result of wanton and reckless disregard of the rights of the passenger, then, under the circumstances, you can award what is known as

'vindictive damages,'—as smart money, or punishment to the company. But that is never allowed except you come to the conclusion that the injury was wantonly inflicted; not through carelessness or negligence, but through wantonness, willfulness and vindictiveness. For instance, if this electric railroad here, the motorman of a car saw the street crowded with individuals or persons, and he got on a head of speed, and made no effort whatever to avoid running over persons on the street, but, with utter disregard to their rights as pedestrians, he would injure any one under those circumstances, that would be a case of exemplary or punitive or vindictive damages wantonly or willfully done. But, where the accident or injury is the result of negligence simply, a jury would not be warranted in awarding vindictive damages under those circumstances. For instance, if you should conclude a conductor had some grudge against a passenger, or that an engineer had some grudge against him, and when he went to alight from the train he would intentionally or wantonly or willfully thrust his engine ahead or back, so as to injure him, if injured under such circumstances, then, in addition to actual damages he received, you could award vindictive or smart-money damages, as smart money, as punishment to the railroad company for inflicting such damages. That is what is meant by vindictive or smart-money damages."

We will now pass upon each one of the exceptions in their order. We do not think the circuit judge was in error, as charged in the first exception. It was his duty, under the complaint and the proofs, to submit the questions as to actual and also as to punitive damages. This is certainly an action ex delicto, and for punitive damages, under the act of 1898 (see 22 St. at Large, p. 693). So far as that act affects this case it is as follows: "Section 1. That in all action ex delicto in which vindictive, punitive or exemplary damages are claimed in the complaint, it shall be proper for the party to recover also his actual damages sustained, and no party shall be required to make any separate statement in the complaint in such action, nor shall any party be required to elect whether he will go to trial for actual or other damages, but shall be entitled to submit his whole case to the jury under the instruction of the court." As we have already announced in the case of *Glover v. Railroad Co.*, 57 S. C. 234, 35 S. E. 510, that act has changed the practice in *Spellman v. Railroad Co.*, 35 S. C. 475, 14 S. E. 947, and other cases following that decision, which require each class of damages to be pleaded separately. It is no longer necessary to plead specifically for actual damages. The circuit judge, in the cases set forth in the act, is obliged to submit his whole case to the jury under his instructions. This ground of appeal is dismissed.

We will next consider the second ground of appeal. When

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the case of Glover v. Railroad Co., supra, was heard, in our judgment we approved the exact language used by the circuit judge in his charge. A circuit judge is to be commended for upholding the decisions of the state supreme court. Besides, under the facts of this case, the charge was sound law.

As to the third ground of appeal, we must say that in reading the testimony we find that witnesses speak of the train being brought to a stop to allow the plaintiff to alight. That being so, in the absence of any testimony that the sudden lurch originated from any force in rear of the train, it of necessity came from the front; and it must have been of terrific force from the engine to cause the result to the plaintiff set out in the complaint and in the testimony. This ground is dismissed.

Nor is there any good ground advanced in the attack of the judge as set out in said fourth ground of appeal. Railroads owe extraordinary care to passengers. The use of the word "appliances" is a general term, and can do the defendant no harm. The appeal must be dismissed. It is the judgment of this court that the judgment of the circuit court be affirmed.

## WHITE

v.

## NEW YORK, P. &amp; N. R. Co.

*(Supreme Court of Appeals of Virginia, March 21, 1901.)*

[38 S. E. 180.]

**Fires Set by Locomotives—Use of Best Appliances—Burden of Proof.\***—Where, in an action against a railroad for damages for a fire claimed to have been caused by sparks emitted from defendant's locomotive, it is shown that the fire was started by sparks, the defendant has the burden of proving that it has availed itself of the best contrivances to prevent the escape of sparks.

**Same—Same—Effect of Evidence.\***—Defendant's locomotive alleged to have emitted sparks which set fire to plaintiff's mill was shown to have been returned two weeks before the fire from the leading locomotive works, where it had been sent for repairs; and those who did the work testified the engine left their hands in good order, and equipped with the most approved appliances for preventing the escape of sparks. It appeared that on the day of the fire the engine had been inspected, and found in good order, which evidence was corroborated by photographs of the spark arrester taken soon after the fire. *Held* that, though the fire originated from sparks thrown from the locomotive, there could be no recovery, it appearing the railroad had discharged its duty by having employed the most approved appliances, in proper repair.

\*See *Georgia & A. Ry. v. Ranson* (Ga.), 19 Am. & Eng. R. Cas., N. S., 463, and *foot-note*.

White v. New York, P. & N. R. Co

Error to circuit court, Accomac county.

Action by one White against the New York, Philadelphia & Norfolk Railroad Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Westcott & Gunter and S. K. Powell, for plaintiff in error.

James H. Fletcher, Jr., for defendant in error.

Harrison, J. This action was brought to recover damages for the destruction of a mill and contents, alleged to have been caused by fire communicated from the engine of the defendant railroad company. There were two trials. On the first there was a verdict in favor of the plaintiff, which was, on motion of the defendant, set aside as contrary to the law and the evidence. On the second trial no evidence was introduced, and a verdict rendered in favor of the defendant, which the court refused to set aside.

All the evidence adduced on the first trial was duly incorporated in a proper bill of exceptions, and the sole question to be determined is whether or not the circuit court erred in setting aside the first verdict and granting a new trial.

In this case the burden is upon the plaintiff to show that the fire arose, as alleged, from sparks emitted by the engine in question. Where the origin of the fire is thus fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had observed every reasonable precaution, and availed itself of the best mechanical contrivances and inventions in known practical use, to prevent the burning of property by the escape of fire. When this has been done, the railroad company has performed its duty, and cannot be held liable. *Railway Co. v. Rogers*, 76 Va. 451; *Patteson v. Railway Co.*, 94 Va. 16, 26 S. E. 393; *Kimball v. Borden*, 97 Va. 472, 34 S. E. 45.

It is by no means clear that the fire which destroyed the plaintiff's mill had its origin in sparks thrown from the engine of the defendant. Without passing, however, upon that question, but assuming that the jury were justified in concluding that the fire resulted from that cause, we are of opinion that the defendant has borne the burden thus imposed upon it, and has brought itself within the rule relieving it from liability by showing that its engine was equipped with the most approved spark arrester, that the same was in proper repair, and that the engine was operated with reasonable care and skill by competent employees.

It appears that about two weeks before the fire the engine in question was returned to the defendant from the Baldwin Locomotive Works, shown to be the largest in the world, and to have the highest reputation in this country for turning out first-class work of the kind. It had been sent to these shops for general repair, and it appears from the evidence of those who did the work that the engine left their hands in first-class



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order, and equipped with the most approved method for preventing the escape of sparks. It further appears that during the two weeks immediately preceding the fire the engine was repeatedly examined with care by the inspector of engines, the last inspection being on the day the mill was destroyed, and each time the spark arrester was found to be in good condition. It further appears that, in accordance with the custom of the company, the efficiency and equipment of this engine was successfully tested and established by being used to haul heavy freight trains with 40 and 50 cars before being used for the passenger service in which it was engaged on the occasion of the fire. This evidence is corroborated by photographs of the spark arrester taken soon after the mill was destroyed. The run made by this engine was from Cape Charles to Delmar, a distance of 95 miles. The evidence shows that a large part of this distance is through woodland, and that along the right of way on the lands adjacent thereto are sedge fields and other inflammable materials, such as dead leaves and dead branches of trees. Notwithstanding these conditions, so inviting to fire from the sparks of a passing engine, it is an established fact in the case that no fire occurred at any point along the entire route, other than that alleged in this case, as the result of sparks emitted by the engine in question, after it came from the repair shops.

Without prolonging this opinion with further recital of the evidence, it is sufficient to say that it satisfactorily appears that the railroad company had discharged its duty in the matter of proper machinery and appliances, and therefore could not be held responsible for the alleged fire.

For these reasons the judgment of the circuit court must be affirmed.

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INABNETT

v.

ST. LOUIS, I. M. &amp; S. RY. CO.

*(Supreme Court of Arkansas, March 9, 1901.)*

[61 S. W. 570.]

**Frightening Horses—Negligence—Unnecessarily Blowing Whistle.\*—**Instructions which made the negligence of defendant's engineer in unnecessarily blowing a whistle and allowing steam to escape so as to frighten plaintiff's horses depend solely on whether circumstances in his knowledge admonished him that injury to plaintiff would probably result therefrom, were erroneous.

**Same—Duty to Lookout for Travelers near Crossing.—**An instruction, in an action for injuries resulting from plaintiff's horse becoming

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\*See generally, monographic note, 5 Am. & Eng. R. Cas., N. S., 283 *et seq.*

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frightened at an engine in the vicinity of a crossing, that defendant's employees "were not bound to take notice of the mere presence of the plaintiff and his horse in close proximity to the railway," was calculated to mislead, as it is their duty to exercise reasonable care to observe travelers in such places.

**Instructions.**—An instruction that mere proof that train employees unnecessarily blew a whistle or let off steam in close proximity to a team of horses, does not necessarily establish negligence, not being predicated on the facts in evidence, should not have been given.

Appeal from circuit court, Nevada county; Joel D. Conway, Judge.

Action by J. A. Inabnett against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

L. A. Byrne, for appellant.

Dodge & Johnson, for appellee.

Wood, J. This suit was brought by Inabnett to recover damages for personal injuries alleged to have been caused by the negligence of the railway company in blowing the whistle and in allowing steam to escape from the steam cocks of its engine while plaintiff, in his buggy, upon the highway, was approaching the public crossing in the city of Texarkana. It is alleged that the unnecessary blowing of the whistle greatly frightened plaintiff's horse, and that, while he was endeavoring to claim same, plaintiff observed an engineer on the engine nearest to him, and saw that the engineer was apprised of plaintiff's danger, but, without regard to plaintiff's safety, the engineer in a grossly careless manner opened the steam cocks of his engine, and began to move the same, which caused the plaintiff's horse to take greater affright, and caused him to suddenly turn from the highway, and to spring down a deep embankment, whereby plaintiff, in an attempt to extricate himself from the danger of the situation, was thrown from the buggy, and seriously hurt, etc. The answer denies all material allegations, and sets up contributory negligence. Without giving the evidence in detail, it is sufficient for the purpose of this opinion to state that there was proof on the part of the plaintiff which tended to support the allegations of his complaint. The jury might have found from plaintiff's testimony that the agents of the defendant knew, or could have known by the exercise of ordinary care and prudence, that the blowing of the whistle, and especially the escaping of steam from the steam cocks of the engine, under the circumstances detailed by the plaintiff, were well calculated to frighten plaintiff's horse, and to endanger plaintiff, and cause the injury of which he complains. There was evidence also to justify the verdict. Was the jury properly instructed? The court gave, on behalf of the defendant, the following, among

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other, instructions: "(3) The jury are instructed that negligence is not to be imputed to the railway company merely from the blowing of a whistle, or causing steam to emit from an engine, even though the same may occasion fright to a horse or horses, unless the same was done under circumstances that made the act an imprudent and improper one upon that occasion; and the jury would have no right to impute negligence to an engineer under such circumstances, unless there were circumstances in his knowledge at the time admonishing him that injury would probably result if the act was done; and in this case, unless the jury find from the testimony that at the time of the accident in question there was nothing in the circumstances of the plaintiff's presence upon the track, or in the conduct of the horse, as seen by the engineer, which would have admonished him in time to have prevented it, or that giving of signals or permitting the steam to emit from his engine was likely to cause the horse to frighten, then he would not be guilty of negligence, even if you find such facts. (4) The court instructs the jury that mere proof that the train employees unnecessarily blew the whistle or let off steam in close proximity to a team of horses does not necessarily establish negligence." "(8) The court instructs the jury, in determining the question of the negligence of defendants' servants, they should take into consideration all of the facts and circumstances, that defendant's servants and engineers were not bound to take notice of the mere presence of plaintiff and his horse in close proximity to the railway, nor that that fact would raise a presumption that the horse would become frightened at the use of steam, but there must have been something at the time in the conduct and actions of the animal which indicated to the engineer that such results would probably follow before he could be charged with negligence." The third and eighth ignored the rule which enjoins upon railroads a high degree of care for the protection and safety of travelers upon the highway at and in proximity to public crossings in cities. It is their positive duty to keep a lookout for such travelers, and to use every reasonable precaution consistent with the proper operation and management of their trains to avoid injuring them. There might not be any circumstances, in the knowledge of the engineer, admonishing him that injury would probably result from the unnecessary blowing of a whistle or escaping of steam. Yet such circumstances might exist, and the engineer's ignorance of them be on account of his willful or negligent failure to do what the law requires; i. e. to keep a lookout for them, and then to do whatever reasonable prudence would dictate to avoid injury to travelers. *Hiltz v. Railway Co.*, 101 Mo. 36, 13 S. W. 946; *Frick v. Railroad Co.*, 8 Am. & Eng. R. Cas. 280; *Weber v. Railroad Co.*, 58 N. Y. 451-462. Nor does the law gauge the standard of negligence by what the engineer in charge in any particular case did or knew. It is broader and more reasonable than

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that. Negligence is determined in cases of this kind by what any reasonably prudent and careful engineer would or should have known and done under the circumstances in proof. Both the third and eighth convey the idea that, unless there was something in the circumstances of the plaintiff's presence upon the track, or in the conduct of the horse "as seen by the engineer," which would have admonished him of plaintiff's danger, then he was not negligent in doing the acts complained of. This, too, regardless of whether he had exercised that prudence which any reasonably careful man would have exercised to become acquainted with the circumstances. In this respect the instructions were radically wrong, and wholly inconsistent with the instructions which the court had given at the instance of plaintiff, and which correctly stated the law. *Railway v. Lewis*, 60 Ark. 409, 30 S. W. 765, 1135. Furthermore, the eighth instruction declares that the employees of the railroad "were not bound to take notice of the mere presence of the plaintiff and his horse in close proximity to the railway." This was well calculated to mislead. The duty of railroads is to exercise reasonable and ordinary care to observe travelers about to cross the railroad upon the highway. Here the travelers have a right to be, and they must be expected to be, constantly passing. They are "ever present," so to speak, and the railroad employees must exercise that diligence which the law requires to observe them. "The care and skill, to be reasonable," it is said, "must be proportioned to the danger and multiplied chances of injury." 3 Elliott, R. R. 1156, and authorities cited. It is generally for the jury to determine whether such care has been exercised. The fourth, to say the least of it, was not predicated upon the facts in evidence, and was, therefore, abstract, and should not have been given. Taken in connection with others, however, it may not have been prejudicial. For the error in giving the third and eighth instructions for appellee the judgment is reversed, and the cause is remanded for a new trial.

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KANSAS & T. COAL RY. CO.

v.

NORTHWESTERN COAL & MINING CO. *et al.**(Supreme Court of Missouri, Jan. 25, 1901.)*

[61 S. W. 684.]

Eminent Domain—Who May Exercise Right—Railroad Not Private Merely Because of Its Relations with Coal-Mining Company Having Same Officers and Stockholders.\*—Where a railroad company is regularly organized as such under laws making it a common carrier, the fact

\*See notes at end of case.

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that its officers, directors, and stockholders are the same as those of a coal-mining company, from which the railroad company will probably draw the major portion of its business, and that the mining company has loaned the railroad company the most of the capital required to build the road, does not render it a private road, so as to deprive it of the power of eminent domain.

**Same—Public Use—Judicial Questions.**—Under Const. art. 2, § 20, providing that, whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public, the general course of judicial decision, that use by a regularly organized railroad corporation is a public use, is a sufficient “judicial determination” to entitle a railroad company to exercise the power of eminent domain without a special investigation of the fact of the particular case.

**Same—Right of Way over Land of Coal-Mining Company.**—In a proceeding by a railroad company to condemn a right of way over the lands of a coal-mining company, the fact that a coal company which has the same officers and stockholders as the petitioning railroad company, and which will furnish nearly all of the business of the plaintiff company, is authorized by statute to condemn land and build a tramway to transport its product to market, is not a defense to the action.

**Same—Same—Defenses—Statutory Right to Select Location.**—In an action by a railroad company to condemn a right of way over the lands of a coal company, the fact that the right of way might just as easily be located on the land of another coal mining company, whose officers and stockholders are the same as those of the plaintiff company, and which will furnish the bulk of the plaintiff’s company’s business, is no defense, since a railroad company is given by the legislature the right to select the location it prefers for its right of way.

**Same—Same—Same—Interference with Authorized Use by Corporation Holding Land—Constitutional Law.**—Rev. St. 1889, § 2741 (section 1272, Rev. St. 1899), providing that, in case lands sought to be appropriated for a railroad right of way are held by any corporation, the right to appropriate the same shall be limited to such use as shall not materially interfere with the uses to which the corporation holding the same is authorized by law to put such lands, does not forbid the appropriation of the lands of a corporation engaged in coal mining for use as a railroad right of way, even though such use materially interferes with their use by the coal company, since Const. art. 12, § 4, declares that the right of eminent domain shall never be abridged so as to prevent the taking of the property of any incorporated company, and subjecting it to public use, and the use by the railroad company is a superior public use to that by the coal company.

**Same—Same—Same—Same.**—Plaintiff railroad company sought to condemn a right of way over the property of a mining company which owned and operated a short railway in such manner that the tracks of plaintiff and defendant would run parallel, and it would be 14 feet from the center of one track to the center of the other. The shaft to the mine of defendant was from 56 to 72 feet from the strip of land sought to be

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condemned, and the main track, switches, and loading tracks of the defendant were on the strip of 56 to 72 feet, which was between the strip sought to be appropriated and the shaft to defendant's mine. *Held*, that the appropriation of the right of way desired by the plaintiff would not materially interfere with the operation of defendant's mine, so as to preclude plaintiff's right to condemn the same.

Same—Same—Same—Same—Future Conditions—Statute.—Under Rev. St. 1889, § 2741 (section 1272, Rev. St. 1899), providing that the right of a railroad company to appropriate land held by any other corporation shall be limited to such use as shall not materially interfere with the use to which the corporation holding the land is authorized by law to put the same, the allegation by defendant that it "intends" to make such use of its lands that the use by plaintiff railroad company of a right of way, which it seeks to condemn over them, will materially interfere with its business, is not a good defense, since the court must deal with conditions that exist at the time condemnation is asked, and cannot consider conditions that may arise.

BURGESS, C. J., and VALLIANT and GANTT, JJ., dissent.

In banc. Error to circuit court, Macon county; N. H. Shelton, Judge.

Proceeding by the Kansas & Texas Coal Railway Company against the Northwestern Coal & Mining Company and others to condemn land for a right of way. From a judgment refusing to appoint commissioners to appraise damages, plaintiff appeals. Reversed.

The plaintiff is a duly organized and chartered railroad company, under the provisions of article 2, c. 42, Rev. St. Mo. 1889, for the purpose of constructing and operating a broad-gauge railroad "for public use in the conveyance of persons and property from a point in, at, or near the town of Ardmore, Macon county, Missouri, to a point in, at, or near the town of Bevier, in the same county and state, a distance of ten miles or more." The plaintiff is also the lessee for a term of 20 years from July 1, 1899, from the Wabash Railroad of its branch railroad from Excello to Ardmore. So that the plaintiff's railroad, with the leased line aforesaid, will form a continuous railroad from the town of Excello, on the Wabash Railroad, to the town of Bevier, on the Hannibal & St. Joseph Railroad. The defendant the Northwestern Coal & Mining Company is a business corporation, organized under the provisions of article 8, Id., for the purpose of acquiring, selling, and operating coal lands and coal mines, and to buy, sell, and deal in merchandise, and to own, operate, and sell electric light and power plants, and to furnish and sell electric light and power. The said defendant holds, as owner or lessee, considerable land on which there have been opened and are being operated coal mines, and in connection with the defendant Watson owns a railroad, and right of way therefor, beginning at a mine owned by defendant Watson, and located several thousand feet southeast of

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the coal company's mine, and extending in a general northwardly direction to and beyond the mine of the coal company, called "Mine No. 7," and to or near a bridge over Sulphur creek, at which point it connects with a railroad owned by the Kansas & Texas Coal Company (likewise a business corporation), and over which last-named road the cars of the railroad owned by the defendant coal company and Watson are run, under a contract therefor with the Kansas & Texas Coal Company, for a distance of about 1,300 feet, to the town of Bevier, on the line of the Hannibal & St. Joseph Railroad. In this way the output of coal from the Watson mine and the Northwestern Coal & Mining Company's mine No. 7 is transported to the line of the Hannibal & St. Joseph Railroad, and over that road to the markets of the world. The mine of the Northwestern Coal & Mining Company, called "Mine No. 7," was leased by that company to the Kansas & Texas Coal Company on the 15th of March, 1898, for a term beginning on the 1st of January, 1898, "until such time as the coal in and underlying said lands shall be entirely worked, and in the manner" provided in the lease, unless the lease is sooner terminated, as therein provided. The lease provided that the lessor was to receive a royalty of  $5\frac{1}{2}$  cents per ton of 2,000 pounds, and that the lessee should so operate the mine as that the royalty should exceed or equal the sum of \$550 a month, and the lessee should also pay such royalty of  $5\frac{1}{2}$  cents per ton on all coal mined in excess of 120,000 tons a year. The lessor reserved the right to cancel the lease on the 1st of April, 1901, or on the 1st of April of any subsequent year, by giving six months' notice of intention so to do. Under the terms of this lease, the Kansas & Texas Coal Company is, and at all the times since the date of the lease has been, operating mine No. 7, and the average daily output of the mine is 700 tons, while that from the Watson mine is from 500 to 600 tons, daily. The railroad of the Kansas & Texas Coal Company, over which the cars of the defendant run from Sulphur creek to Bevier, extends south-westwardly from the intersection of those roads to Mine No. 43, which mine is also operated by the Kansas & Texas Coal Company.

This was the condition of affairs on the 16th of April, 1899, when the Kansas & Texas Coal Railway instituted this proceeding, under the provisions of article 6, c. 42, Rev. St. 1889, for the purpose of condemning a right of way over five pieces of real estate, three of which pieces lie immediately east of the main line of the railroad of the Northwestern Coal & Mining Company, and such strips commence 7 feet east of the center line of the main or most eastward track of the Northwestern Coal Company's railroad, and extend from Sulphur creek for a distance of some 3,700 feet, to a point 1,700 feet south of mine No. 7, where it is proposed to cross the railroad of the Northwestern Coal Company. In other words, the purpose of this suit is to condemn a right of way for the plaintiff railroad

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beginning at Sulphur creek, and paralleling the most easterly track of the Northwestern Coal Company's railroad for a distance of 3,700 feet, and there crossing the defendant's track, so as to proceed to the town of Ardmore. The western line of the right of way sought to be acquired by the plaintiff is 7 feet from the center of the defendant's main or most easterly track, and the center of the plaintiff's track is 14 feet from the center of the defendant's main track.

The plaintiff's petition is in the usual and proper form. The answer of the defendant the Northwestern Coal & Mining Company is a general denial and special defenses. The special defenses are: (1) That the plaintiff has not the right to condemn land. (2) That the St. Louis Trust Company is a necessary party defendant, because it is the holder of bonds issued by the Kansas & Texas Coal Company. (3) That the plaintiff is not a public railroad corporation, and has no intention to build a railroad for public use, but that the plaintiff corporation has been promoted and organized by, and is owned and belongs to, the defendant the Kansas & Texas Coal Company; that said coal company and said railway have the same officers, and largely, if not entirely, the same stockholders; that the Kansas & Texas Coal Company owns and controls a large number of mines and coal lands in Macon county near Bevier and Ardmore, and between those two places, and has furnished the plaintiff company about \$70,000 to build the road, and holds a mortgage therefor on the plaintiff company's property; that the plaintiff railroad is organized solely in the interest and for the benefit of the Kansas & Texas Coal Company; and avers that it would be a fraud to take the defendant's property for the purpose of a right of way for the plaintiff railway. (4) That the defendant coal company is engaged in the mining business near Bevier, and owns the land the plaintiff railway proposes to condemn, and, in connection with defendant Watson, it has built and owns and operates a railroad to carry its coal to the Hannibal & St. Joseph Railroad for shipment to the markets; that it has only a right of way of 40 feet, and that all of it is necessary for the proper operation of its mines and railroad; that plaintiff's proposed right of way is within 7 feet of the center line of defendant's railroad, and, if plaintiff is allowed to condemn the right of way so described, it will largely, if not wholly, destroy the defendant's business, and that the plaintiff ought not to be allowed, under the guise of building a railroad, to destroy the business of the defendant for the benefit of its rival in business, the Kansas & Texas Coal Company. (5) That the construction of the plaintiff's road as contemplated would also ruin Watson's business, and would force him and the defendant coal company to use the plaintiff's road, and put them at the plaintiff's mercy as to charges and railroad rates. (6) That there is no necessity for the plaintiff to condemn this land, because it owns a right of way 100 feet wide adjoining the defendant's



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right of way on the east, and the plaintiff could and should be compelled to build the road on the land it already owns. (7) That it is inequitable, unjust, and contrary to law and good conscience to allow the plaintiff to condemn this land, since it is not for a public purpose, but for the benefit of the Kansas & Texas Coal Company, and that "its business would be greatly injured, not to say ruined, by allowing plaintiff to build and construct the railroad upon the line marked out." The answer asks that the petition be dismissed, that the court refuse to appoint commissioners to assess damages, and that the plaintiff be enjoined from condemning, or attempting to condemn, a right of way along the specified line, or from building a railroad thereon.

The trial court heard evidence upon the issues so raised by the answer, and decided that the plaintiff had a right to condemn land, as the purpose was a public use, but that the condemnation and use by the plaintiff railroad of the three tracts of land owned by the defendant coal company would materially interfere with the uses which the defendant coal company is authorized by law to subject such lands to, and therefore the plaintiff could not condemn this land under section 2741, Rev. St. 1889, and hence the court refused to appoint commissioners to assess the damages, and entered a final judgment for the defendants. After proper steps, the plaintiff brought the case to this court by writ of error.

Adiel Sherwood, for plaintiff in error.

Ben Eli Guthrie and Dysart & Mitchell, for defendants in error.

Marshall, J. (after stating the facts). 1. The plaintiff is a regularly organized and chartered railroad company under the laws of this state, and therefore it has power of eminent domain to condemn land for a right of way not exceeding 100 feet wide. This is conceded by defendants as a general proposition in this case, and it is further conceded by the defendants that a railroad charter regular on its face cannot be attacked or questioned collaterally or in any manner except by quo warranto. But it is contended by the defendants—First, that the plaintiff is a private, and not a public, railroad, and therefore it has no power of eminent domain; and, second, that the use to which the land is here attempted to be condemned and appropriated and applied is a private, and not a public, use. In support of the first contention, it is claimed that the plaintiff is a mere tool or creature of the Kansas & Texas Coal Company; that the officers and directors of the two are the same, and the stockholders substantially the same; that the coal company furnished \$70,000 to the plaintiff to build its railroad, and holds a mortgage on its property for that amount, and that the coal

**Eminent Domain  
—Who May  
Exercise Right—  
Railroad Not  
Private Merely  
Because of Its  
Relations  
with Coal-Min-  
ing Company  
Having Same  
Officers and  
Stockholders.**

company owns large coal mines and large tracts of coal lands in Macon county, near Bevier and Ardmore, and between those places; and that the plaintiff is organized solely for the purpose of benefiting the coal company, and hence the plaintiff is a private, and not a public, railroad. And, in support of the second contention, it is claimed that, the first contention being true, the use to which the land is to be applied is a private, and not a public, use.

If, as it is conceded, the plaintiff is a regularly organized railroad company, and its charter and rights cannot be questioned except by quo warranto, it is difficult to understand how the courts in a proceeding of this character can hear evidence as to whether the officers, directors, or stockholders of the plaintiff company are the same as those of the Kansas & Texas Coal Company, or whether the coal company loaned the plaintiff company \$70,000 or any other sum; for, if all this be conceded, it would avail nothing in this case, unless the rights inherent to, and expressly granted to, a railroad company could be inquired into and taken away from such a company in a collateral proceeding. *National Docks Ky. Co. v. Central R. Co.*, 32 N. J. Eq., loc. cit. 755-760. But, aside from this, the contention is untenable. There is nothing in the letter or spirit or policy of the law which prohibits the same persons from forming and conducting two or more different corporations, one a business, and the other a railroad, company. Neither is there any prohibition in the law against a railroad company borrowing money, on bonds secured by mortgage on its property, to build and operate its road, from a business corporation, rather than from a bank, a trust company, or an individual.

The second contention is equally untenable. The charter of the plaintiff and the laws of this state expressly require the plaintiff to transport persons and freight, and the plaintiff can be compelled by mandamus to do so if it refuses. The fact that almost the entire volume of business now in sight for the plaintiff to do will be the transportation of coal produced by the Kansas & Texas Coal Company does not destroy the character of the plaintiff as a railroad company, nor convert it into a private, and not a public, railroad, nor does it make the use to which the land sought to be condemned is to be applied any the less a railroad right of way, and therefore a public use. So long as the company holds its charter, it speaks in the name of the state when it comes into court and asks to condemn land for a railroad right of way, and it would be intolerable that, whenever it seeks to exercise the extraordinary power by this summary process, the courts should stop to inquire into the charter or regularity or legality of its organization, or into the motives of the incorporators, or their relations to, or holdings in, other corporations of a different character. The law is settled in this and other states that the use of land for railroad tracks is a public use. *St. Louis, H.*

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& K. C. Ry. Co. v. Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. 483; Dietrich v. Murdock, 42 Mo. 279; Railway Co. v. McGrew, 104 Mo. 282, 15 S. W. 931; Railroad Co. v. Moss, 23 Cal., loc. cit. 328; Colorado E. Ry. Co. v. Union Pac. Ry. Co. (C. C.) 41 Fed. 293; De Camp v. Railroad Co., 47 N. J. Law, 44; Railway Co. v. Petty (Ark.) 21 S. W. 884; Arkansas & O. R. Co. v. St. Louis & S. F. R. Co. (C. C.) 103 Fed. 747.

So that while it is true that the constitution (section 20, art. 2) provides "that, whenever an attempt is made to take private property for a use alleged to be public, the question

Same—Public  
Use—Judicial  
Question.

whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public," it is also true that it has been judicially determined that the use of land for a railroad right of way is a public use, and not a mere private use. There can be no doubt that if the Wabash Railroad was asking to condemn this land, to extend its branch that now runs from Excello to Ardmore so as to reach these coal mines, or if the Hannibal & St. Joseph Railroad was seeking to condemn a right of way for a branch from Bevier to these coal fields, it would be a condemnation of land for a public use; and, if either of these existing roads did this, they would serve the same public purpose, get the same business, and act under, and be subject to, the same laws, as the plaintiff is seeking to do. There is no difference, in right or in principle, whether it be done by either of these great railroad systems as a mere branch thereof, or whether it be done by the plaintiff, whose road and leased line is only about a dozen miles in length. The length of the road does not determine the right, or the nature or character, of the use of the land. Many roads of less mileage than the plaintiff's serve most useful public purposes, are almost indispensable to commerce, and are veritable gold mines to their owners. The output from mine No. 7, leased by the defendant coal company to the Kansas & Texas Coal Company, averages 700 tons a day. This alone is quite a considerable business, and, if the plaintiff company serves no other purpose than to help to get that much coal to the markets every day, it will serve a most useful public purpose, even if it gets no other business; and, as herein pointed out, it can be compelled to carry other freights and passengers.

The case is not without precedent in the law, and all of the defenses that are made here have been made and held insufficient in other cases. A reference to a few will suffice:

Same—Right of  
Way over Land  
of Coal-Mining  
Company.

Dietrich v. Murdock, 42 Mo. 279; Railroad Co. v. Moss, 23 Cal. 323; Colorado E. Ry. Co. v. Union Pac. Ry. Co. (C. C.) 41 Fed. 293; New Central Coal Co. v. George's Creek Coal & Iron Co., 37 Md. 537; Powers v. Railway Co., 33 Ohio St. 429; Butte, A. & P. Ry. Co. v. Montana Union Ry. Co. (Mont.) 41 Pac. 232, 31 L. R. A. 298; National Docks Ry. Co. v. Central R. Co., 32

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N. J. Eq. 755; *De Camp v. Railroad Co.*, 47 N. J. Law, 44; *Mining Co. v. Seawell*, 11 Nev. 394; *Mining Co. v. Corcoran*, 15 Nev. 147; *Boyd v. Negley*, 40 Pa. 377; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659.

The cases of *Dietrich v. Murdock*, 42 Mo. 279; *Railroad Co. v. Moss*, 23 Cal. 323; *Colorado E. Ry. Co. v. Union Pac. Ry. Co.* (C. C.) 41 Fed. 293; *New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537; *Powers v. Railway Co.*, 33 Ohio St. 429; *Butte, A. & P. Ry. Co. v. Montana Union Ry. Co.* (Mont.) 41 Pac. 232, 31 L. R. A. 298; *De Camp v. Railroad Co.*, 47 N. J. Law, 44; *Mining Co. v. Seawell*, 11 Nev. 394; *Mining Co. v. Corcoran*, 15 Nev. 147; *Boyd v. Negley*, 40 Pa. 377; and *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 695,—are in all essential particulars similar to the case at bar. They were cases where an existing railroad was endeavoring to condemn a right of way for a railroad that would reach coal or mineral mines, and transport the products thereof to the markets, or where a new railroad company, organized practically for that purpose, was seeking to do the same thing. In *Dietrich v. Murdock*, 42 Mo. 279; *Railroad Co. v. Moss*, 23 Cal. 323; *Colorado E. Ry. Co. v. Union Pac. Ry. Co.* (C. C.) 41 Fed. 293; *New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537; and *Powers v. Railway Co.*, 33 Ohio St. 429,—the same persons owned the coal mines, and the railroad was organized principally to transport the products of the coal mines to the market, and precisely the same objections and defenses were made in those cases as are made in this case; yet in each instance the right of eminent domain was sustained, and the use declared to be a public use. These precedents are in entire consonance with reason, principle, and the spirit, letter, and policy of the law, and abundantly support the ruling of the trial court in this regard.

Of course, if a railroad company should undertake to condemn land for a purpose that was not within the scope of the powers and purposes legally allowed to railroads, such a proceeding would not only be *ultra vires*, but would be a taking of land for a private use. But the condemnation of land, for the purpose of constructing and operating thereon a railroad, in its very nature and essence, cannot be the taking of land for any other than a public use. Section 14, art. 12, of our constitution declares: "Railroads heretofore constructed or that may hereafter be constructed in this state, are hereby declared public highways, and railroad companies common carriers. The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads of the state, and shall from time to time pass laws establishing reasonable maxim rates of charges for the transportation of passengers and freight on said railroads and enforce all such laws by adequate penalties." And the general assembly

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has passed such laws (section 1126 et seq., art. 2, c. 12, Rev. St. 1899), and provided for punishing any railroad that refuses to receive freight or passengers (section 1122, Id.); and has required the railroad commissioners to see to the enforcement of the law (section 1145 et seq., Id.); and has expressly prescribed that mandamus shall lie to enforce the rights so secured, and in addition imposes a fine for a violation of the law (section 1154, Id.).

If the constitution is to be respected, it follows, as surely as the shadow does the sun, that land condemned by a railroad can only be used for a public purpose,—is a public highway,—and therefore cannot be used for private purposes. The land so appropriated and used is as much a public highway as a street in a city, so far as the use is concerned, and can no more be employed or used for private uses than a street can be. This is the purpose, and this the use, for which the land is sought to be condemned. The right must exist unless it be true that the length of the road, or the volume of business likely to be done, at once limits or qualifies or takes away the right or changes the character of the use. Such a contention manifestly disproves itself. But authority is not wanting to show that the courts have always refused to put any such construction upon such provisions in a constitution or in the laws. *Talbot v. Hudson*, 16 Gray, 417; *Colorado E. Ry. Co. v. Union Pac. Ry. Co.*, supra; *Railroad Co. v. Moss*, supra; *De Camp v. Railroad Co.*, supra; *Gaslight Co. v. Richardson*, 63 Barb., loc. cit. 448; *Fanning v. Gilliland* (Or.) 61 Pac. 636; *Hartwell v. Armstrong*, 19 Barb. 166; *Aldridge v. Railroad Co.*, 2 Stew. & P. 199; *Gilmer v. Lime Point*, 18 Cal. 229; *Coster v. Water Co.*, 18 N. J. Eq. 54; *O'Reiley v. Draining Co.*, 32 Ind. 169; *Riche v. Water Co.*, 22 Alb. Law J. 498; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659; *National Doncks Ry. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *Railroad Co. v. Porter*, 43 Minn. 527, 46 N. W. 75; *Ross v. Davis*, 97 Ind. 79; *Irrigation Co. v. Mehrtens*, 97 Cal. 676, 32 Pac. 802; *Waterworks Co. v. Bird*, 130 N. Y. 249, 29 N. E. 246. These cases decide that the principle is the same whether all the people of the state, or only all the people of the same locality, have a right to demand and receive service from the corporation,—then the use or purpose is public, and not private. In *Dietrich v. Murdock*, 42 Mo., loc. cit. 283, this court settled the law on this subject in this state in the following concise and clear annunciation: "The legislature, in the exercise of its discretion in delegating to this company the right of eminent domain, evidently proceeded upon the idea that the public interest was to some extent, at least, to be subserved by its creation. What the precise degree of its usefulness to the public might be is not, in our view of the case, necessary to be determined. We think the courts of the country ought not to interfere with the exercise of this discretion, except in those cases where it is manifest that private interests alone are to be promoted,

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and private rights violated, to the extent of taking the property of one individual and transferring it to another. The sixth section of the act (Acts 1846-47, p. 153), under which this company claimed its corporate existence, declares that 'said company shall have the exclusive power to acquire, own, and employ steam power, or animal power, locomotives, cars, and carriages necessary for the transportation of passengers, coal, and every description of personal property on said road for themselves and other persons.' Whether the private interests of this company were such as to require the construction of this road, or constituted the main reason for the act of incorporation, with the power conferred by it, is not material. It is enough that, by the terms of the law, it is made a public corporation for the use and benefit of that particular section of the state. The public had a right to demand that the means of transportation, both for passengers and freight, commensurate with its wants, should be provided by the company. Any failure of its duty to the public in this particular, and to transport passengers and freight when offered for that purpose, would have subjected the company to an action for damages. It must be assumed, then, that the grant of authority to the company to condemn the land necessary for a roadbed was a rightful exercise of legislative discretion." To my mind, the principle is axiomatic,—a truism,—and needs no precedent to prove or support it. It is absolutely incomprehensible to my mind to contend for such a construction in the face of the constitution and laws of this state. If the plaintiff condemns this land, the constitution at once imposes it with a public use. The plaintiff cannot use it for any other purpose. It must serve all people alike, or it can be compelled by mandamus to do so, and forced if it refuses. The fact that all the people of the state do not need it does not change its character or the use it can legally put the land to. No railroad serves all the people. It can only serve the public living along its line, or desiring to travel over it, and if it does this its rights and powers and duties are the same, under the constitution and laws of this state, whether it is only 10 miles long or is a monster railroad girding the state from one end to another.

2. The defendants contend, however, that there is no necessity for this railroad or this proceeding, because the Kansas & Texas Coal Company has an ample remedy, under section 1119, Rev. St. 1899; that is, that section provides that when any person owns a coal, lead, iron, or zinc mine, located near or within a reasonable distance of any railroad track, and the railroad commissioners are of opinion that the amount of business is sufficient to justify it, such owner may, at his own expense, build and keep in repair a switch leading from the railroad to such mine, and the railroad company is required to furnish the switch stand and frog and other necessary material for making connection with its track, and to make such connection, the mine owner to pay the actual cost

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thereof. It is apparent, however, that this could only be done where the mine owner owns the ground or right of way over which the switch is to run. If he does not own it, he is, of course, not in a position to construct a private switch; for he has no power to condemn a right of way, and cannot demand that the railroad company shall exercise its power of eminent domain to acquire such a right of way. This thought evidently came to defendants' counsel when making this claim, for they follow it up by calling attention to sections 9559, 9560, Rev. St. 1899, as affording another remedy. That is, those sections provide that, if any person owns land lying within 20 miles of a railroad, and has no access to such railroad by any public road running from such lands to such railroad, "convenient for mining, agricultural, or commercial purposes," such owner may petition the county court for the establishment of a private road, and the court shall appoint commissioners to assess the damages to the owners of the lands through which such private road will pass, and the proceedings shall be the same as provided for the establishment of a private road (section 9459, Rev. St. 1899 et seq., the petitioner to pay the damages), but such owner may construct and use on such private road a tramway for the purpose of hauling and carrying coal and other products to such railroad, and such road shall not be less than 20 nor more than 40 feet wide. In other words, the contention amounts to this: That the Texas & Kansas Coal Company, a business corporation, without the power of eminent domain, may in this way have the county court condemn a private road, not less than 20 nor more than 40 feet wide, and that company may construct thereon a tramway for hauling its coal to the railroad, and in this way other persons' land, or even defendant's land, may be condemned for a use which it is claimed is a private, and not a public, use, but the plaintiff railroad cannot condemn this land. Even if all this be true, it is no defense to this action. Neither of the remedies afforded by these provisions of the statutes is exclusive, nor do they supersede or take away the right of eminent domain possessed by the plaintiff. It may also be doubted if the last-named remedies would be adequate even for the transportation of the volume of coal now being produced. Seven hundred tons of coal a day may possibly be moved over such a tramway along a private road, but it would be rather an obsolete method of hauling that much freight every day in the year, and might have a tendency to increase the price of coal to the consumers. A wagon train of sufficient number might haul 700 tons of coal a day, but it would scarcely be deemed an up-to-date method of transporting that much freight. A tramway is better than a wagon train, but is as much inferior to a railroad train as it is superior to a wagon train for such purposes.

3. The defendant further claims that there is no necessity for locating the plaintiffs' railroad at the proposed place, and

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that it could just as easily be located somewhere else (as, for instance, on the 100 foot strip to the east of this property, which is owned by the Kansas & Texas Coal Company), where it would not interfere with the defendant's road or its business. The answer to this is obvious: The railroad company has the right of eminent domain. It is given the privilege by the legislature to select the location it prefers, upon paying therefor, and therefore the courts have no right to deny the exercise of the power vested in the company either absolutely, or because the court may think some other location is as good or better. In speaking on this subject, Lewis, Em. Dom. § 286, says: "This is a matter which rests wholly with the legislature. The legislature may designate particular property to be taken, or this may be left to the discretion of those upon whom the authority is conferred, with or without limitations. In the absence of any statutory provision, the particular route to be followed between designated points, in case of a railroad or similar way, rests in the discretion of the company." This question, however, was set at rest in this state in the case of St. Louis, H. & K. C. Ry. Co. v. Hannibal Union Depot Co., 125 Mo., loc. cit. 93, 94, 28 S. W. 486, where Macfarlane, J., said: "But it is said that there is no such necessity for the appropriation of a part of defendant's property as justifies the exercise of the power of eminent domain. The use of land for railroad tracks has ever been regarded as a public use. Counsel does not question this proposition, but insists that defendant's property ought to be exempt if plaintiff has other routes over the lands of other proprietors which could be used in reaching the terminus of the road. In other words, that defendant's property, being already devoted to one public use, cannot be taken unless the necessity is so absolute that without it the grant itself will be defeated; that the necessity must be beyond plaintiff's control, and not one created by itself for its own convenience, or for the sake of economy. It is undoubtedly true that 'the right of eminent domain rests upon necessity, and that alone. Beyond this there is no right.' Pennsylvania R. Co.'s Appeal, 93 Pa. 150. But it is also true that the sovereignty must be the judge of the necessity of taking the property, and the legislature has delegated to railroad corporations the right to exercise the power, and the courts of this state have always held the use of land by a railroad to be for a public use. The sovereignty has lodged with railroad companies the power of selecting and adopting their own routes, subject only to such limitations as have been imposed. Whenever the use of private property on the line adopted is necessary, the necessity exists. There is no distinction in this respect between private and corporate property, except when the exercise of the power as to the latter should 'materially interfere with the uses to which, by law, the corporation holding the same is

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authorized' to apply it.' The defendant is in error in saying the plaintiff owns a right of way 100 feet wide lying just east of the land sought to be condemned. The plaintiff does not own any such land. The Kansas & Texas Coal Company owns a strip of land 100 feet wide, which lies east of the defendant coal company's land, and by refusing to recognize the separate identities of the plaintiff and the Kansas & Texas Coal Company, and treating the latter as the owner of the plaintiff, the defendants base their claim that the plaintiff owns the 100-foot strip. This contention is without legal foundation. The Kansas & Texas Coal Company would have the same right to object to the condemnation of its land that the defendants have to object to the condemnation of their land. If the contention were well founded, the result would be that the plaintiff could not condemn any land; for every other landowner would likewise have the same right to object to his land being condemned. Yet in McGrew's Case the right of condemnation was held to exist, and McGrew's land was taken, notwithstanding it was used as a coal mine.

4. The defendants next insist, and the trial court decided, that this plaintiff cannot condemn this land because the use of the land by the plaintiff for a railroad track would materially interfere with the use of the land to which by law the defendant coal company is authorized to put the line. This contention and decision is based upon a construction put upon section 2741, Rev. St. 1889 (section 1272, Rev. St. 1899). That section is as follows: "In

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case the lands sought to be appropriated are held by any corporation, the right to appropriate the same by a railroad, telephone or telegraph company shall be limited to such use as shall not materially interfere with the uses to which, by law, the corporation holding the same is authorized to put said lines," etc. The plaintiff contends—First, that this statute only applies to any corporation that possesses the power of eminent domain, and has already applied the land to a public use, and that it does not apply to land owned by a business corporation, organized for private gain, and that performs no public function, and renders no public service, and that the defendant coal company is not within this class. And, second, that, if this is not so, then the section is void, because in conflict with section 4, art. 12, of the constitution, which provides that "the exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking, by the general assembly, of property and franchises of incorporated companies already organized, or that may be hereafter organized, and subjecting them to the public use, the same as that of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when in the exercise of said right of eminent domain, any incorporated company shall be interested either

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for or against the exercise of said right." And, third, that the proposed use of the land by the plaintiff company will not materially interfere with the use thereof by the defendant coal company. Section 2741, Rev. St. 1889, first appeared in the statutes of this state as section 8, c. 66, Gen. St. 1865, and has been continued in the revisions in the same words ever since, except that the word "telephone" has been inserted between the words "railroad" and "telegraph." This section 2741, Rev. St. 1889, follows section 2740, Id., which provides: "No telephone or telegraph company shall, by virtue of this article, be authorized to enter or appropriate any dwelling, barn, store, warehouse or similar building, erected for any agricultural, commercial or manufacturing purposes, or to erect poles so near thereto as materially to inconvenience the owner in their use or to occasion any injury thereto;" and this section was section 7, art. 66, Gen. St. 1865, except that the word "telephone" has been added. It has been decided in this and other jurisdictions, and is the accepted law, that the fact that land sought to be condemned for a public use is held, owned, and used by a corporation organized for private gain is no defense to the right of condemnation. Twelfth St. Market Co. v. Philadelphia & R. T. R. Co., 142 Pa. 580, 21 Atl. 902, 989; Lewis, Em. Dom. § 274, and cases cited. The same principle is declared, even where the property sought to be condemned is held and used by a corporation possessing the power of eminent domain, and is using the same for a public purpose. St. Louis, H. & K. Ry. Co. v. Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. 483; Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S. W. 943; Kansas City S. B. R. Co. v. Kansas City, St. L. & C. R. Co., 118 Mo. 599, 24 S. W. 78; Lewis, Em. Dom. § 274, and cases cited. The only qualification to this rule is that such property cannot be taken from one corporation by another corporation, to be used for the same purpose, in the same manner that it was used by the corporation that first appropriated it to such use and purpose. Id. § 276. In other words, every corporation holds property subject to the right of the state to take it for another public use, whenever, in the discretion of the legislature, the exigencies require its use for such other purpose; and this is true, even as to the franchise itself, of any corporation. Twelfth St. Market Co. v. Philadelphia & R. T. R. Co., 142 Pa., loc. cit. 580, 21 Atl. 902, 989; In re Sunderland Bridge, 122 Mass. 459; In re Opinion of Justices, 66 N. H. 629, 33 Atl. 1076; New York Cent. & H. R. R. Co. v. Metropolitan Gaslight Co., 63 N. Y. 326; In re Bellona Co., 3 Bland, 442; Enfield Toll-Bridge Co. v. Hartford & N. H. R. Co., 17 Conn. 40; Boston & L. R. Corp. v. Salem & L. Ry. Co., 2 Gray, 1. This is what is meant by section 4, art. 12, of the constitution, which declares that the exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking by the general assembly of the property and fran-

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chises of any incorporated company, already or hereafter organized, and subjecting them to public use, the same as that of individuals. In *Railway Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931, it was held that the property of an individual coal miner might be taken for railroad purposes. In *Railway Co. v. Wolf*, 137 Ill., loc. cit. 365, 27 N. E. 78, the property of a coal mining company was held subject to condemnation for railroad purposes, notwithstanding the construction of the railroad would destroy a tramway that extended from the shaft of the mine to the tracks of another railroad. In *St. Louis, H. & K. Ry. Co. v. Hannibal Union Depot Co.*, 125 Mo., loc. cit. 92, 28 S. W. 483, the property of a corporation used for a union depot was held subject to condemnation for railroad purposes. In the *Twelfth St. Market Case*, 142 Pa. 542, 21 Atl. 902, 989, the property of a corporation used as a public market was held subject to condemnation for railroad purposes.

In the light of this constitutional provision, and of these adjudications in this, and even in other, states, that have no such constitutional reservation, it cannot be said that the legislature intended by section 2741 to say, or had the constitutional right to say, that property held by any corporation, public or private, possessing or not possessing the power of eminent domain, should not be subject to condemnation for another or superior public use. That section is a simple legislative declaration that the use of the land for railroad purposes is not a superior use to the use of the land by the company that owns it, and has already devoted it to one use authorized by law. It goes without saying that one railroad company could not condemn the right of way of another railroad company, and use it for the same purpose as the first company was using it. But the state has the power to condemn and take away, not only the right of way of a railroad company, but also its franchises.

Applying these principles to the case at bar, we find that the defendant company's charter does not authorize it to hold or use land for railroad purposes, but that it is only authorized to buy, sell, and operate coal lands and coal mines, to buy and sell merchandise, and to own and operate electric light and power plants, and to sell electric light and power. The power to build and operate a railroad is not expressly conferred, nor is it necessarily implied in the powers conferred. So, while the defendant coal company can own and use lands for mining coal, that is the full extent of the use which its charter gives it to make of this land. And if it be true, as was decided in *Railway Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931, that the property of an individual miner, used for mining coal, can be condemned for railroad purposes, then it follows that, under section 4, art. 12, of the constitution, the property of any incorporated company used for the purpose of mining coal is likewise subject to condemnation, and this and all courts are

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expressly prohibited by that section of the constitution from construing the property of an incorporated company exempt from condemnation when the property is held by an individual would be subject to condemnation. The legislature, therefore, has not said by section 2741 that property held as this property is held shall be exempt from condemnation, and if the legislature had said so it would be an unconstitutional act, because it did not make property held and used in like manner by an individual also exempt from condemnation. It is within the province of the legislature to exempt any kind of property from the power of eminent domain delegated by the state to a corporation, and section 2740 does exempt dwelling houses, etc., from being taken or used by telegraph or telephone companies; but, under the constitution, it is beyond the power of the legislature to exempt any class of property from condemnation if it is owned by any kind of an incorporated company, and to make it subject to condemnation if it is owned by an individual.

5. The circuit court, however, assumed that section 2741 was a valid enactment, and held that the condemnation of this land by the plaintiff for railroad purposes would materially interfere with the use to which the defendant was authorized by law to apply it. It has already been pointed out that the defendant coal company has no power under its charter to construct, operate, or maintain a railroad, and hence it is not authorized to use any part of the land for railroad purposes. But, aside from this, the facts are simply these: The center of the defendant's track will be 14 feet from the center of the plaintiff's track. The defendant's testimony shows that tracks 13 feet from center to center is a safe construction. The evidence further shows that the New York Central and Pennsylvania roads have parallel tracks, whose centers are only 12 feet and 12 feet and 2 inches apart. Assuming that the cars are 9 feet in width, a car on one road would extend  $4\frac{1}{2}$  feet towards the cars on the other road, so the two would occupy 9 feet of the 14 feet space between the centers of the two tracks. This would leave a space of 5 feet between passing cars. It needs nothing but common sense to determine that, as cars must run on fixed rails, there can be no danger in running cars on separate tracks when they cannot get closer than 5 feet to each other. It is too plain to admit of debate that the plaintiff's railroad, so constructed, could not interfere in any manner with the operation of the defendant's railroad. The plaintiff's railroad could not interfere with the operation of the mine, for the shaft to the mine (which is operated by the Kanass & Texas Coal Company, and not by the defendant coal company) is from 56 to 72 feet west of the west line of the strip sought to be condemned, and where the plaintiff's railroad will run. The switch or loading tracks used by the defendant company are located on this strip of 56 to 72 feet of land, and are all be-

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tween the main track of the defendant company and the shaft to the mine. So that it cannot be said that the construction of the plaintiff's road will in any manner whatever interfere with the operation of the mine, or the use to which the defendant has applied or is authorized to apply the land. But, even if it did so interfere, the McGrew Case, *supra*, is ample authority for holding that the land is not exempt from condemnation for railroad purposes. The defendants evidently realize that this is true, for they seek to strengthen their case by showing that they contemplate opening a new mine south of the Watson mine, and have already surveyed and located a track to such new mine, which will leave the track running to Mine No. 7, and run to the Watson mine, and that it will need the land here sought to be condemned to use for such new track. Courts must deal in cases like this with the conditions that exist at the time the condemnation is asked, and

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tions-Statute.

cannot take into account conditions that may or may not arise or be created thereafter. *Butte, A. & P. Ry. Co. v. Montana Union Ry. Co.*, 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298; *Colorado E. Ry. Co. v. Union Pac. Ry. Co.* (C. C.) 41 Fed. 293. It furthermore appears from the record herein that the defendant company on the 21st of February, 1899, proposed to the plaintiff company to accept \$3,000 for the right of way here sought to be condemned, with an agreement as to crossing and protection to defendant's road where the grade of the plaintiff's road is below that of defendant's road. The plaintiff offered \$300, and refused to pay \$3,000. Manifestly, it cannot be true that the location and operation of the plaintiff's railroad upon this land would materially interfere with the present or future use of the land for mining purposes, or with the operation of the defendant's railroad, much less that it would practically destroy defendant's business and road, if the defendant was willing to sell this identical land to the plaintiff for a railroad right of way for \$3,000. The real dispute between the plaintiff and defendant, therefore, is the difference between \$3,000, the price the defendant offers to take, and \$300, the price the plaintiff offers to give, for the property in question to be used for a railroad right of way. It follows from what has been said that the circuit court erred in refusing to appoint commissioners to assess the damages for the taking of the land for railroad purposes, and in entering judgment for the defendants, and therefore the judgment of the circuit court is reversed, and the cause remanded, with directions to appoint such commissioners, and to proceed in accordance herewith.

Sherwood, Robinson, and Brace, JJ., concur. Burgess, C. J., and Valliant and Gantt, JJ., dissent.

Valliant, J. (dissenting). The principle of law involved in this suit is so important, and the consequences that may result from the establishment of the doctrine contended for by the

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plaintiff are so serious, that I feel constrained to, at least briefly, express the reasons why I am unable to concur in the opinion of the majority of the court. The evidence in the record showed to the satisfaction of the trial court, and it shows to my satisfaction, that this is a controversy between two rival coal companies, wherein one, having assumed for the purpose the legal garb of a railroad corporation, is endeavoring to shut its rival out from the market and reduce it to a dependency. The Kansas & Texas Coal Company and the Northwestern Coal & Mining Company are both owners and operators of coal mines in the same vicinity, and rivals in business. Each company owns railroad tracks which it uses for the sole purpose of carrying the products of its own mines to a convenient point on the nearest public railroad. The defendant company is incorporated under the general statute relating to business and manufacturing corporations, and the Kansas & Texas Coal Company is a corporation of like character. But the stockholders and officers of the latter company have availed themselves of the provisions of the general statute in relation to railroads, and have taken out a charter under that statute also, under the name of the Kansas & Texas Coal Railway, and that corporation holds title to the railroad tracks in the service of the Kansas & Texas Coal Company, and is the plaintiff in this case. The identification of the two corporations in actual unity of interest and personnel of the incorporation is shown beyond question. That the so-called "railroad corporation" is but the agent of the coal company of that name, with no business, past, present, or in contemplation, but that of carrying the coal company's product to the nearest railroad, is also beyond question. Now, the Kansas & Texas Coal Company proposes in this proceeding, in the name and in the garb of its alter ego, the Kansas & Texas Coal Railway, to condemn a right of way over the property of the defendant coal company for the construction of other railroad tracks, which are in fact designed for the exclusive use of the Kansas & Texas Coal Company. The defendant by its answer says, and by its proof shows, that this is in fact but the taking of private property for a private use; that, if the plaintiff is permitted to do as it proposes, it will shut the defendant out from market, and ruin its business; that it is an abuse, not a use, of the power of eminent domain. But the court is asked to say, in reply: "That question of fact we cannot look into. The plaintiff comes with a charter in due form, which denominates it a railroad corporation. No one but the state can question its right to exercise all the prerogatives of a railroad corporation, and, if it condemns land for its use, no one can question that that is a public use. Its charter is conclusive on that point, and, if the effect is to shut you out from market except upon such terms as your rival may see fit to prescribe, still the court cannot look beyond the charter for the real truth." The defend-

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ant shows by its answer and evidence that the plaintiff's demand is for but a wanton destruction of defendant's business; that the plaintiff already has a right of way just as available as that sought to be condemned. But we are told that our answer to the defendant must be: "We cannot dictate to a railroad corporation where it will locate its lines, nor can we question its motives. The defendant, being only a mining corporation, has no power to condemn. Therefore, if its rival in this proceeding is permitted to lay its tracks as it may, and as it is apprehended it will, the defendant cannot cross the tracks with its railroad, and is shut in." The evidence shows that if the plaintiff lays and operates its tracks so close to those of the defendant, while there may yet be room for trains to pass, still the appliances required for conveniently and economically handling its business cannot be used, and even the lives of its employees will be endangered. But the answer to all this is that the charter is conclusive, and the courts are not only powerless to grant any relief, but must even suffer themselves to be used to effect the gross wrong and abuse. If that is the law, we are in a bad way. If courts are so incrustated in form that they are not only powerless to do right, but must even yield themselves as instruments to effect a wrong, we are far from perfection. I do not believe that that is the law. When a suitor comes into court and asks its aid, the court has a right to know in what character he comes, real or fictitious. In my opinion, therefore, when the trial judge became satisfied that the real plaintiff in this case was the Kansas & Texas Coal Company, wearing the mask of a railroad corporation, he had the authority, and it was his duty, to refuse to appoint commissioners looking to a condemnation of the defendant's property.

Even if a real railroad corporation should come into court seeking to condemn land ostensibly for railroad use, and it should be shown to the court, as clearly as the true facts were shown in this case, that the real object was to obtain a site for a summer villa for its president, the court should refuse to appoint commissioners. Property taken for the real use of a real railroad company is taken for a public use, and the courts so declare as a matter of law; but the courts have never declared that all property sought to be taken in the name of a railroad corporation is conclusively adjudged to be sought for a public use, and that no inquiry into the truth can be had. It is argued in behalf of plaintiff in error that a railroad corporation, chartered for the sole purpose of carrying to market the product of coal mines owned by the same men who own the railroad, is engaged in a public service, and may exercise the right of eminent domain, and numerous cases are cited as supporting that proposition. But that proposition does not measure up to the point the plaintiff seeks to reach in this case. If it has ever been decided that a coal company could take on itself the character of a railroad company for its

own private use, and exercise the right of eminent domain for the sole purpose of closing out its rival in business, and preventing another coal mining company from bringing its product to market, and that the courts were bound to assist it in that purpose, I have not seen such decision, and, indeed, would not care to see it. There is nothing in the condemnation procedure prescribed by our statute that marks such narrow bounds for the court as to reduce it to a mere ministerial office, without judgment or discretion; and, if there is no precedent for the court in such matter to exercise a judicial power to reach the truth and justice of the case, it is our duty to make a precedent.

It is also argued that, whatever may be the purpose of the plaintiff in seeking to condemn its right of way over defendant's land, when its road is once built it becomes a public highway, and the plaintiff can be compelled by mandamus to carry the defendant's coal on the same terms that it carries the coal of the Kansas & Texas Coal Company. True as that may be in theory, courts cannot pretend not to know that is only theory. The court should not require the defendant to submit to a wrong in the first place, with a half promise to redress his injury at some future time.

The trial court was of the opinion that the condemnation of the 40-foot strip of defendant in question, and the subjecting of it to the use of the plaintiff's purpose, would materially interfere with that use; that defendant corporation had by law the right to use it, and the condemnation was therefore forbidden by section 2802, Rev. St. 1889, now section 1350, Rev. St. 1899. That section provides that, when the property sought to be condemned is already held by a corporation, the right to condemn "shall be limited to such use as shall not materially interfere with the uses to which by law the corporation holding the same is authorized to put said property." Article 12, § 4, Const., ordains that the power of eminent domain shall not be so abridged as to prevent "the taking of property or franchises of incorporated companies, \* \* \* and subjecting them to the public use, the same as that of individuals." But that does not mean that the property of a corporation which is already being applied to a particular public use may be taken from it by another corporation for the purpose of applying it to the same, or even to another, public use, if thereby the public use which it is already serving is to be destroyed or impaired. So this section of the statute is not repugnant to that clause of the constitution.

It is contended by plaintiff that the corporation whose property is by the statute protected to some extent from condemnation is only a corporation which has the right to exercise eminent domain, and that the property so exempted is such as is held by it either by grant or condemnation for a public use. On the other hand, it seems to be argued that it applies to all property of all corporations. I am not inclined to the extreme view of either side of that question. But I think



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that the statute was intended to limit the condemnation of property held by a corporation for a public use, even though the corporation was not such as is authorized to exercise the right of eminent domain, and I do not think that it was designed to affect property that is held for merely private use. We may suppose two concerns, each conducting the same kind of business,—say a mercantile business,—side by side; the one is owned by a corporation, the other by an individual. The law could not have contemplated that the property of the individual might be taken, and that of the corporation exempt. And, on the other hand, we recognize that there are corporations whose property is being used for a public purpose, yet which have not the power to condemn, because they are not organized under the statute which confers such power. Many street-railroad companies and some other corporations are of this character. They are public carriers, and their property is in public use, but they are not organized under the general railroad statute.

Now, it is argued in this case that, although the defendant corporation owns and operates a railroad, yet, as it is not chartered as a railroad corporation, its railroad is not devoted to a public use, whereas, the plaintiff being so chartered, its use is a public use. But we have seen that the actual use, past, present, and prospective, to which the railroads of each corporation is devoted, is exactly the same. The fact is the same in each instance. If a difference exists, it is only in theory, and that theory purely fictitious. We are asked to say that it is lawful for the plaintiff to condemn the defendant's property on the theory that in defendant's hands it is being devoted to private use, yet when condemned it is in plaintiff's hands to be in fact devoted to exactly the same character of use; that the charter makes one private, and the other public, though they are in fact the same. If there is any force in the decisions referred to, which hold that a railroad designed and used exclusively to bring to market the product of a coal mine is in a public service, they establish the fact that the use to which the defendant is devoting the 40-foot strip in question is a public use, and, that being so, the plaintiff, even if it be a railroad corporation, is, by the terms of the statute quoted, forbidden to impair the defendant's use of the same. For these reasons, the action of the trial court in refusing to appoint commissioners was right, and its judgment should be affirmed.

Burgess, C. J., and Gantt, J., concur in the above views.

## NOTES.

**POWER TO CONDEMN RIGHT OF WAY FOR RAILROAD BRANCHES, SPURS,  
OR PRIVATE RAILROADS TO OR FROM PRIVATE PROPERTY TO BE  
SPECIALLY BENEFITED.**

As to whether or not property may be condemned for such purposes, the authorities do not seem to be in harmony. This seems to result

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from a difference in opinions in regard to what is a public use. They are grouped in this note in accordance with their respective determinations as to whether or not the use in question was a public one, authorities of the same state being found under both heads.

**WHEN A PUBLIC USE.**

**No Objection That Side Track Will Also Furnish Shipping Facilities to Coal Company.**—Where a side track at a particular point is shown to be necessary for legitimate railroad purposes, the company will not be enjoined from condemning land therefor because a side track at that place will also further private interests, as by furnishing shipping facilities to a coal company. *St. Louis, I. M. & S. R. Co. v. Petty*, 57 Ark. 359, 21 S. W. Rep. 884; *Chicago R. Co. v. Dix*, 17 Am. & Eng. R. Cas. 157, 109 Ill. 237.

**To Company's Stock Yards.**—*In re New York Cent., etc., R. Co. v. Metropolitan Gas-Light Co.*, 63 N. Y. 326, it appeared that the petitioning corporation had acquired title to a large tract of land in the city of New York, with a water front, upon which it had erected extensive depots and yards for live stock transported over its road, and proposed to erect a large elevator and an abattoir; it sought to condemn land for the purpose of laying extra tracks to enable trains to approach the various structures on said premises with convenience and dispatch, and without danger. *Held*, (1) that a necessity was established authorizing the appropriation of the land; (2) it was no objection that portions of the petitioner's premises were leased to others, and for business purposes which would be benefited by the appropriation, and which of themselves would not authorize the condemnation of land.

**Where Development of Coal Mines of Railroad Company the Primary Inducement.**—The right of eminent domain should not necessarily be denied to a railway corporation because of the fact that the primary inducement moving its promoters was to develop coal mines, belonging to the corporation and that its road is poorly constructed. If such a road is made a common carrier, runs regular trains, and has expended large sums in acquiring its right of way and constructing its road, its use is public, and it may exercise the right of eminent domain. *Colorado E. R. Co. v. Union Pac. R. Co. (C. C.)*, 41 Fed. 293, 44 Am. & Eng. R. Cas. 10.

**Railroad to Connect Private Property with River or Highway.**—The Pennsylvania statute of May 5, 1831 authorizing the condemnation of private property for the construction of lateral railroads to connect private property with public river or highway is not unconstitutional as authorizing condemnation of property for private use. *Harvey v. Thomas*, 10 Watts (Pa.) 63, 36 Am. Dec. 141.

Nor is such act unconstitutional because it authorizes the condemnation of land for the construction of a railroad by a mine owner for the transportation of coal from his mine. *Harvey v. Lloyd*, 3 Pa. St. (3 Barr) 331; *Shoenberger v. Mulhollan*, 8 Pa. St. (8 Barr) 134.

A statute, (Act S. Car. Dec. 23, 1886, § 15) providing that corporations existing under its provisions for mining or manufacturing purposes shall have the power to construct and operate a railroad, tramway, turnpike or canal for their own use and purposes, to and from their works, or

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place of business, or to connect with some navigable stream, or with some existing railroad, turnpike, or other public highway, not to exceed ten miles in length, and shall have right to condemn for the use of such road the right of way in lands over which the road may pass, on payment to the owner thereof just compensation, such compensation to be determined in the manner provided by law for railroad companies,—is not repugnant to the constitutional provision, (Art 1, § 23, S. Car. Const.) that private property shall not be taken or applied for public or private purposes, or for the use of corporations, without just compensation being made therefor; provided, however, that laws may be made securing to persons or corporations the right of way over the lands of either persons or corporations, a just compensation in all cases being first made. *Ex parte Bacot*, 50 Am. & Eng. R. Cas. 598, 36 S. Car. 125, 15 S. E. Rep. 204, 16 L. R. A. 586.

**Road Not Shown to Be Intended Merely for Logging Railroad.**—In *Bridal Veil Lumbering Co. v. Johnson*, 30 Ore. 205, 34 L. R. A. 368, it appeared that a railroad was chartered from a town past a sawmill, through a thinly settled timbered and mountainous country and did not go near any other town, settlement or thickly settled neighborhood, or other railroad; that there were connected with it no freight or passenger depots, no passenger coaches, and no freight cars; that any one riding on its trucks, the only cars ever run on the road, were permitted to do so free of charge; but it was not shown that it was intended exclusively for the transportation of the lumber of certain parties, nor that it could not be used by the public for the carriage of freight and passengers. *Held*, that it must be deemed a public railroad, such as to justify the exercise of the power of eminent domain in its behalf.

**For Transportation of Products from Coal Mine.**—In *Phillips v. Watson*, 63 Iowa 28, it was held that the Iowa statute entitled, "An Act Authorizing the Establishing of Public Ways to Land Having Stone or Mineral Thereon," was constitutional and authorized the condemnation of land for the construction of a spur from a public railroad to a coal mine. But it was also held that the spur must be so used that the public's right to avail themselves of it would not be destroyed. See also, *Jones v. Mahaska County Coal Co.*, 47 Iowa 35. See also, *Hibernia Underground R. Co. v. De Camp*, 47 N. J. L. 518, 54 Am. Rep. 197.

Private property is subject to condemnation for the construction of a railroad to be used by a mining company for the transportation of coal from its mines, as such a use is a public one. *New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537; *Hags v. Risher*, 32 Pa. St. 169.

**For Transportation of Materials to Mines.**—In *Dayton v. Gold, etc., Min. Co.*, 11 Nev. 394, it was held that a mining corporation could condemn land for the construction of a railroad for the transportation of materials to its mines, required for their operation.

**Road Built by Private Corporation Largely for Use of Mine Owners.**—Under Const. art. 15, § 5, declaring that all railroads shall be public highways and common carriers, the mere fact that a railroad is built by a private corporation, and that its branches and spurs run convenient to private mines, and are largely for the use of the mine owners, does not destroy its character as a public use, so as to deprive it of the right of

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eminent domain. *Butte, A. & P. Ry. Co. v. Montana U. Ry. Co.*, 41 Pac. Rep. 231, 16 Mont. 504.

**For Small Railroads to Be Owned by Companies Promoted Partially as Private Enterprises.**—Where land is taken for its use by a railroad company having *prima facie* the right to exercise the power of eminent domain, the question whether the use is public or private depends upon the right of the public to use the road and to require the corporation as a common carrier to transport freight or passengers over the same, and not upon the amount of business done by the company. *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461, 40 Am. & Eng. R. Cas. 449; *De Camp v. Hibernia U. R. Co.*, 48 N. J. L. 48; *Phillips v. Watson*, 63 Iowa 33; *Clarke v. Blackmar*, 47 N. Y. 156; *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 324, Lewis, Em. Dom., 166. Nor does the question whether the use is public or not depend on the number of persons who may have occasion to use the railway; if all persons have the right to use it, it is a public use though the number who require the use may be small. *Chicago, B. & N. R. Co. v. Porter* (Miss.), 43 Am. & Eng. R. Cas. 170. And so far as the public is concerned, when what railroad corporations need is for "public use" they have the right to invoke the exercise of eminent domain; but in so far as that which concerns them as to their private interests, their profits and gains are concerned, they stand as individuals or merely as private corporations in which the public has no concern, and for such private purposes cannot call into exercise the power of eminent domain. *Pittsburg W. & K. R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 36 Am. & Eng. R. Cas. 531.

**Private Railroads Connected with Public Railroads or Highways.**—The right of the legislature to authorize the construction of private railways over the land of another is predicated upon the fact that such railways shall be made to connect with some public improvements, railroads or highways of some description, as enumerated in the act of 1832 and its supplements. *Waddell's Appeal*, 84 Pa. St. 90.

**Spur for Accommodation of Business upon River Front.**—Where the record shows that the construction of branches and spur tracks laid down on the map, for the accommodation of business and shipping interests upon a river front, is essential to any successful operation of the petitioner's road, it must be held to be necessary for public use. *Toledo, Saginaw & Macinaw R. Co. v. East Saginaw & St. Clair R. Co.*, 36 Am. & Eng. R. Cas., N. S., 553, 72 Mich. 206, 40 N. W. Rep. 436.

**Spur to Iron Works.**—The power to construct a spur to iron works was recognized in *Getz's Appeal* (Pa.), 3 Am. & Eng. R. Cas. 186. The court saying in its opinion: "We cannot assent to the opposite contention, which holds that a side track, which leads only to a manufacturing or mining establishment, held in private ownership is illegal, because it does not subserve a public use. These establishments are very numerous, especially in Pennsylvania, along a near line of railroad. They serve to develop the resources of the state, they give employment to vast numbers of citizens and constitute a most important element in the general wealth and prosperity of the community. Convenience and consequent cheapness of transportation are in most cases essential, and in many vital to their maintenance. Moreover, considerable portions of

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the general public are directly interested in the traffic which goes to them, and in that which comes from them. Hence in the connection in which we are now considering them, we cannot regard them as merely private interests, and therefore without the pale of that public use, for which private property may be taken in the construction of railroads lawfully established and actually used for public purposes. *Cleveland & Pittsburgh R. v. Speer*, 30 Pa. St. 332; *Pittsburgh v. Pennsylvania R.*, 48 Pa. St. 359."

**Side Track for Carrying Coal to Village Waterworks.**—But it is no valid objection to the condemnation of a strip of land for a switch or a side track of a railway corporation, that the proposed track may serve private use, if in addition to serving such use, it is one also necessary for the successful and convenient operation of the main line of the railroad. *South Chicago R. Co. v. Dix*, 17 Am. & Eng. R. Cas. 157, 109 Ill. 237. In this case the court said in its opinion: "The fact of the track running to the waterworks of the village, and being used for carrying coal to those works, is relied upon, as also the provision of the ordinance making it a condition that this track should be built to these waterworks of the village. It is insisted that this is a mere private use, and that the track was built to serve this use, and because the company was obliged to build it by the requirement of the ordinance. This certainly shows that the track does serve this private use, and that it was designed to do so; and if it served this use merely, and was not an aid in the convenient operation of the main line of the railroad, appellee's position would be maintained. But if, in addition to serving such use, the track be one which is necessary for the convenient operation of the main line of the railroad, then it may properly come within the purview of a side track."

**Branch Track to Elevator of Private Parties.**—Where the legislature authorizes the common council of a city to grant permission to lay railroad tracks along or across the streets, subject to the right of property owners to recover damages under the general railroad statute, the council can authorize a branch track running to an elevator belonging to private parties, but to be used by a railroad company in transferring grain to and from the elevator. *Clarke v. Blackma*, 47 N. Y. 150.

In this case, however, it appeared that a very considerable freight business for a great number of persons was carried on over this branch track.

**Spur Track to Gravel Pit.**—A railway company is authorized by Gen. St. 1894, §§ 2645, 2646, to acquire land by condemnation for a right of way for a spur track from its main line to its gravel pit, for the purpose of obtaining necessary gravel to enable it to safely maintain and operate its railroad. Such a taking of land is for a public purpose or use. *In re Minneapolis & St. L. R. Co. v. Nicolin* (Minn.), 13 Am. & Eng. R. Cas., N. S., 445.

## WHEN NOT A PUBLIC USE.

**Collateral Enterprise Remotely Connected with Operating Railroad.**—The need of the land in aid of collateral enterprises, remotely connected with the running or operating of a railroad, will not justify an assertion of the right of eminent domain. *In re Rochester, H. & L. R. Co.*, 110 N. Y. 119, 13 Cent. Rep. 234, 17 N. E. Rep. 678, 16 N. Y. S. R. 863.

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**Private Road for Transportation of Mining Products.**—Private property is not subject to condemnation for the roadbed of a tramway, the property of a corporation organized for the purpose of mining and selling coal, to be extended to a railroad, so as to secure to the railroad company the means of transporting its coal; as private property cannot be condemned for a merely private use. *Hall v. German Coal Co.*, 118 Ill. 427, 10 N. E. Rep. 199, 59 Am. Rep. 379. In this case the court said in its opinion: "If from the nature of the business and the way in which it is to be conducted, it is clear no obligations will be assumed to the public, or liability incurred, other than such as pertain to all strictly private enterprises, it may safely be concluded the use is private, and not public. It is also believed to be generally, if not universally, true that benefits resulting from a public use, capable of individual appropriation, are open to all alike, upon the same terms and conditions.

"Viewing the question before us in the light of the general principles here stated, it is clear, the use for which the land is proposed to be taken in this case is not a public one. The coal, the coal works and the present tramway are, in the strictest sense, private property, and the public, generally, have no more interest in them or in the operation of the works, including the tramway, than they have in any other strictly private business. The same would be equally true after the proposed extension of the tramway. The extending of it to the railroad would not change its character, or the obligations of the company to the public in the slightest degree. Without the consent of the owners of it, there is not a person in the state, outside of themselves, who would have the right to ride upon it on any terms that might be proposed, or to have carried upon it a single pound of freight. Indeed nothing of the kind is contemplated or intended. It is manifest, the company now has, and after such extension of its track would still have, the right to use it for its own private business, exclusively. It could run it or cease to use it altogether, without violating any right in the public, or any duty which it owes to the people. Clearly, this could not be so if the use were public, in the sense of the constitution." See also, *People v. Pittsburgh, R. Co.*, 523 Cal. 694; *State v. Hazelton, etc., R. Co.*, 40 Ohio 504.

**Road for Benefit of Coal Mine Owned by Incorporators.**—A railroad company had no right to condemn land for the roadbed of a railroad constructed for the benefit of private coal mines owned by its incorporators. *State v. Hazelton, etc., R. Co.*, 40 Ohio St. 504, 20 Am. & Eng. R. Cas. 569.

In the case of *Appeal of Edgewood R. Co.*, 79 Pa. St. 257, it appeared that a number of persons had procured a charter for a railroad company, and, under cover of constructing a railroad for public use, were engaged in the construction of a railroad from a tract of coal owned by themselves to the Pennsylvania Railroad. The supreme court of Pennsylvania, finding the facts to be that the railroad was projected and constructed with the primary object of connecting the coal mines with the Pennsylvania Railroad. *Held*, that the railroad was being constructed for private purposes under cover of a charter obtained under the general railroad laws of the state; that there appeared a perversion of an enactment passed for one purpose, in order to subserve other and inconsistent purposes.

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**Road Used Exclusively for Business of Corporation in Which Petitioner's Incorporators Are Stockholders.**—Upon an application to appoint commissioners to appraise private property sought to be acquired by a corporation organized under N. Y. Act of 1888 (ch. 462, Laws 1888), which authorizes the formation of elevated tramway corporations for the transportation of freight and the condemning of private lands for the corporate purposes, these facts appeared: The petitioner's articles of association state that it was formed for the purpose of constructing, maintaining, and operating an elevated tramway between two points specified, "a distance of about four miles." The map originally filed, and the only one filed, did not include the lands in question. The tramway had been built and was in operation for a distance of about three and one half miles. One of the termini was upon the lands of a manufacturing corporation, the other upon the lands of the petitioner, near the manufactory of said corporation. The incorporators of the petitioner were stockholders, interested in said corporation, and the petitioner was organized and thus far has been operated exclusively as an instrumentality to facilitate the business of the corporation. The lands sought to be acquired were to increase the petitioner's terminal facilities at the northern terminus of its road. There is no public highway leading to this terminus. All that was claimed by the petitioner was that the surplus of the capacity of the road, after supplying the wants of said manufacturing corporation, was to be let to some one individual engaged in selling coal, to be used in transporting that article. As to whether there would be any such surplus, or whether it could be availed of by the public, did not appear. It also appeared that the petitioner had lands which could be used for the purpose for which the land in question was desired, but not as conveniently. *Held*, that the use for which the land was sought to be acquired was not public, but private, and that the petitioner's application was properly denied. *In re Split Rock Cable R. Co.*, 51 Am. & Eng. R. Cas. 514, 128 N. Y. 408, 28 N. E. Rep. 506, 40 N. Y. S. R. 334.

**For Private Use of Controlling Stockholder.**—Where it is shown that a railroad is to be built solely for the private use of a controlling stockholder, the company is not entitled to exercise the right of eminent domain, even though it is organized under the general railroad law (Act Pa. April 4, 1868) entitled "An act to authorize the formation and regulation of railroad corporations," and its promoters profess that its organization is for a public purpose. *Weidenfeld v. Sugar Run R. Co.*, 51 Am. & Eng. R. Cas. 505, 48 Fed. Rep. 615; *Western Pa. R. Co.'s Appeal*, 104 Pa. St. 399.

**To Private Brick Works.**—Where the tract for which appellant sought to condemn appellee's land was a branch road intended for the private use of handling the freight of a certain brickworks, *held*, that condemnation of property for such a use is unauthorized by law, and the proceedings should have been dismissed as soon as such purpose became apparent. *Chicago & E. I. R. Co. v. Wiltse*, 24 Am. & Eng. R. Cas. 261, 116 Ill. 439, 6 N. E. Rep. 49.

**To Private Lumber Mills.**—Under the Texas constitution and statutes, without any express grant therefor, a railroad company has not the

power to condemn lands for right of way for the purpose of building a side line or switch, running off to lumber mills, when it appears that such lateral line is not necessary for the purpose of "construction, operation, and maintenance" of its road, nor required for the purposes of "the incorporation or the transaction of its business." *Kyle v. Texas & N. O. R. Co.*, 3 Tex. App. (Civ. Cas.) 518.

**To Private Steel Mill.**—As far as the public is concerned, when what railroad corporations need is for "public use," they have the right to invoke the exercise of eminent domain; but, in so far as that which concerns them as to their private interests, their profits and gains are concerned, they stand as individuals, or merely as private corporations, in which the public has no concern, and for such private purposes cannot call into exercise the power of eminent domain. *Pittsburg, etc., W. & K. R. Co. v. Benwood Iron Works (W. Va.)*, 36 Am. & Eng. R. Cas. 531, 8 S. E. Rep. 453, 2 L. R. A. 680. In this case it appeared that a railroad corporation sought to condemn land, over which to build a switch, branch road or lateral work, to reach a private manufactory, a steel mill, for the purpose of transporting freight to and from said steel mill over petitioner's road, *held*, the use to which the land was to be subjected was a private, not a "public, use."

**Private Railways in Streets.**—Highways are held in trust for the public and its uses, and for no other purpose. It is therefore absolutely essential to the validity of every legislative grant of the use of the public streets that such use should be of a public character. Hence the municipalities have no power to grant a franchise for the construction of a railroad in public streets for private use only. *Mikesell v. Durkee*, 34 Kan. 509; *Glaessner v. Anheuser-Busch Brewing Ass'n*, 100 Mo. 508.

Private tramways, intended exclusively for private use, are beyond the lawful servitude of public streets, and cannot be built thereon without the consent of the owner of the fee any more than upon other portions of his estate. *Bradley v. Pharr*, 45 La. Ann. 426.

**Conversion of Private Wagon Road into Lateral Railroad.**—A private road, which is a wagon or cart road, cannot be converted into a lateral railroad by putting a railroad track on it when opened. The restrictions of the lateral railroad act upon the exercise of the power of taking private property for public use cannot be evaded by converting a private road into a lateral railroad. *Keeling's Road*, 59 Pa. St. 358.

**Railroad for Carriage of Sight Seers.**—A railroad which does not connect with a highway; which can only be reached by passing over state or private lands; which can have no habitations along, or any freight traffic over, the road; whose sole business is to convey sight seers along the Niagara river, and the season of whose operations is confined to four months of the year, is not such a railroad corporation as is contemplated by the general railroad act of 1850, and there is no such public use as to justify the exercise of eminent domain in its behalf. *In re Niagara Falls & W. R. Co.*, 33 Am. & Eng. R. Cas. 99, 108 N. Y. 375, 15 N. E. Rep. 429, 13 N. Y. S. R. 690, 11 Cent. Rep. 272.



## Youngblood v. South Carolina &amp; G. R. Co

## YOUNGBLOOD

v.

## SOUTH CAROLINA &amp; G. R. CO.

*(Supreme Court of South Carolina, March 27, 1901.)*

[38 S. E. 232.]

**Appeal—Ground for Objections.**—Where plaintiff objects to the admission of certain testimony, but states no ground of objection, the admission of the testimony will not be reviewed on appeal.

**Injury to Employee—Damages—Evidence—Size of Family.\***—In an action for injuries to a servant, evidence of the size of his family and their dependence on him was admissible on the question of damages, since it tended to prove loss of capacity to meet obligations imposed by law on such servant.

**Same—Same—Impairment of Health Need Not Be Specially Plead.**—In an action for injuries to a servant, evidence that his general health had been impaired by the injury was properly admitted, though no such impairment had been alleged in the complaint, since it was not necessary to the recovery for direct effects of an injury that they should be set out in the pleadings.

**Same—Defective Coupling Appliances—Pleading and Proof.**—Where the complaint in an action for injuries to a servant alleged the negligent furnishing of defective "coupling appliances," evidence as to whether the brakeman injured had received a coupling stick was properly admitted under the allegations of the complaint, since "coupling appliances" would embrace a coupling stick, and absence thereof would make a defective set.

**Same—Same—Assumption of Risk.\***—Where a brakeman saw a defect in the coupling mechanism of a car, but nevertheless attempted to couple it to another, and was injured, the brakeman did not assume the risk of injury from such defect, as a matter of law.

**Same—Same—Same—Construction of Statute Providing That Knowledge of Defect Shall Be No Defense.**—Under Const. art. 9, § 15, providing that knowledge by an employee of the defective or unsafe condition of any machinery shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of unsafe cars or engines voluntarily operated by them, a motion for a nonsuit on the ground that undisputed evidence showed that a brakeman suing a railroad for injuries resulting from defective mechanism saw the defects complained of before using such mechanism, and thereby assumed the risk, was properly denied, since the constitution meant that such prior knowledge of defects would not defeat the action.

**Harmless Error.**—Where testimony at first excluded was afterwards admitted, the exclusion was harmless.

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\*See notes at end of case.

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**Instructions.**—Where there was no testimony in a suit against a railroad for injuring a brakeman from which the jury could infer that the cars causing the injury were foreign cars, a requested instruction that, if the jury found that they were foreign cars, they should find for defendant, was properly refused.

**Same—Liability for Defects in Foreign Cars.\***—A requested instruction that, if the jury found that the cars injuring plaintiff in a suit against a railroad for injuries were foreign cars, "then it was only required of defendant to make an ordinary inspection for any defects discernible by ordinary examination," was properly refused, since the law requires a master to furnish suitable appliances, whether they are his property or that of another.

**Same—Contributory Negligence—Proximate Cause.**—A requested instruction that, if the jury found that plaintiff in a suit against a railroad for injuries knew or ought to have known whether the coupler causing his injury was constructed so as to require more care than ordinary couplers, they should consider such knowledge in ascertaining whether plaintiff used ordinary care, was properly refused, since it did not premise that such want of care was the proximate cause of plaintiff's injury.

**Same—Assumptions of Risk from Defective Machinery.**—A requested instruction in an action for injuries to a servant that a servant assumes all risks, except those arising from unsafe or defective machinery and keeping the same in repair, could not be complained of as failing to state that risks from obvious defects in machinery were assumed, in absence of a request to charge on the specific proposition, since the general proposition of law was correctly stated.

**Same.**—A requested charge in an action for injuries to a servant that "knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby, such as injury resulting from a defective switch, coupler, or other appliance in use by railroad companies," was properly granted, since, except the last clause, which was illustrative and applicable to the case, it was in the language of Const. art. 9, § 15.

Appeal from common pleas circuit court of Richland county;  
J. C. Klugh, Judge.

Action by John B. Youngblood against the South Carolina & Georgia Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

B. L. Abney and E. M. Thompson, for appellant.

Wm. D. Melton and P. H. Nelson, for respondent.

Gary, A. J. This is an action for damages sustained by the plaintiff while in the employment of the defendant as switchman in its yard in the city of Columbia on the 3d day of December, 1898. The complaint alleges that on said day the defendant, in disregard and viola-

Case Stated.

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\*As to master's duty to inspect foreign cars, see *Eaton v. New York, etc., R. Co.* (N. Y.), 18 Am. & Eng. R. Cas., N. S., 391, and *foot-note*.

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tion of its duty, negligently and carelessly provided and furnished to the plaintiff a car which was not good, safe, or secure, in that the coupler and the coupling appliances thereof were worn, broken, and defective; that, while the said car was in the use and service of the defendant, the plaintiff, while adjusting the coupler and coupling appliances thereof, in the endeavor to couple the same with those of another car of, and in the use and service of, the defendant, had his right forearm, by reason and in consequence of the unsafeness, defectiveness, and insecurity aforesaid, caught between the couplers of said cars, and crushed, bruised, and broken; that by reason thereof the plaintiff suffered great bodily pain, and was ill and incapacitated for work for about three months, and was compelled to have his forearm amputated, and was permanently injured in the loss of said forearm. The defendant answered the complaint, denying its allegations, and setting up the defense of contributory negligence. At the conclusion of plaintiff's testimony the defendant made a motion for a nonsuit, which was refused. The jury rendered a verdict in favor of the plaintiff for \$2,700.

The defendant appealed upon exceptions, the first and second of which are as follows: "(1) Excepts because the presiding judge erred in allowing the plaintiff to testify, over the objection of defendant, as to being a married man, and as to the number of his children, and their ages, because, it is submitted, such evidence was irrelevant to any issue raised by the pleadings, and was incompetent upon the question of the amount of damages claimed. (2) Excepts because the presiding judge erred in overruling defendant's objection to, and allowing the plaintiff to answer, the question: 'Has your wife and those children any means of support, except what you provide for them? Answer. No, sir.' Such evidence, it is submitted, being irrelevant to any issue raised by the pleadings, and incompetent upon the question of the amount of damages claimed." The questions presented by these exceptions arose during the examination in chief of the plaintiff, as follows: "Q. Are you a married man? A. Yes, sir. Q. How many children have you? Mr. Abney: We object. By Mr. Nelson: What means have you for support, besides what you can make by your labor? A. None at all. Q. Are you dependent upon that for a support for yourself and family? A. Yes, sir. What family have you? Mr. Abney: We object to the testimony with regard to the condition of the plaintiff,—as to his financial condition, as to his family relations, or anything else. The Court: A man is bound by law to provide for the support of his family, so far as he can do so. Now, if this man's children were independent, self-supporting,—if they were of age,—I think the question might be irrelevant, whether he had any children; but if he has those who are dependent upon him for support, and for whose support the law imposes on him the obligation of providing for them,

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then it becomes competent, under the allegation of the complaint that he is permanently injured, in ascertaining the question of the extent of the injury, in so far as it may or may not incapacitate him to meet the obligations which are imposed upon him by law. I think the question competent. Q. How many children have you? A. Five. Q. How old is the oldest one? A. Ten. Q. And the youngest? A. About five months. Q. Has your wife and those children any means of support, except what you provide for them? Mr. Abney: We continue to object to the whole line of the evidence. The Court: Note the objection, which is overruled. A. No, sir." The grounds of objection are not stated. When objection is made to the introduction of testimony, the ground thereof should be clearly and specifically stated, in order that the circuit judge may know upon what question he is requested to rule. "A ground of objection which was not ruled upon by the presiding judge cannot be urged in this court." Allen v. Cooley, 53 S. C. 80, 30 S. E. 722; Norris v. Clinkscales, 59 S. C. 243, 37 S. E. 821.

Appeal—  
Grounds for  
Objection.Injury to Em-  
ployee—Damages  
—Evidence—Size  
of Family.

But, waiving this objection, the testimony was admissible, not for the purpose of showing that the plaintiff was entitled to recover damages sustained by the members of his family by reason of his injury, but as tending to show that one of the direct and proximate results flowing from the defendant's alleged negligence was to deprive him of the capacity to meet the obligation, imposed upon him by law, of supporting his family. Johns v. Railroad Co., 39 S. C. 162, 17 S. E. 698; Mathis v. Railway Co., 53 S. C. 258, 31 S. E. 240. If this was a direct and proximate result of the injury, we see no reason why it should not have been considered by the jury in estimating the damages which he sustained. Pickens v. Railroad Co., 54 S. C. 498, 32 S. E. 567. A person is certainly damaged when he is deprived of the ability to meet a legal obligation. These exceptions are overruled.

The third exception is as follows: "(3) Excepts because the presiding judge erred in overruling defendant's objection to, and allowing the plaintiff to answer, the question: 'And your general health since you lost this arm; your general health— Has it been good or impaired? Answer. Been bad. I have suffered from rheumatism ever since.' Whereas, it is submitted that, the complaint containing no allegation that plaintiff's health had been affected, such evidence should have been excluded." In 5 Enc. Pl. & Prac. 746, 747, under the head of "Describing Injuries," it is said: "It is not necessary, in an action for personal injuries, that the petition should undertake to give a specific catalogue of the plaintiff's injuries. It is enough that the declaration shows the injury complained of, without describing it in all its seriousness, and a recovery should be had in proportion to the extent of the injury." And

Same—Same—  
Impairment of  
Health Need  
Not Be Specially  
Pleaded.

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under the head of "Effect or Result of Injury" we find the following, on page 747: "Nor do the rules of pleading require that every effect or result following the infliction of particular injuries shall be set forth in the declaration, in order to recover therefor, since such course would, in effect, require the pleading of the entire evidence." In 3 *Suth. Dam.* 2663, the rule is thus stated: "The general rule in tort is that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting, although such injury could not have been contemplated as the probable result of the act done. The plaintiff may show specific, direct effects of the injury without specially alleging them,—as that he was thereby made subject to fits. If they were a part of the result of the injury, the plaintiff may recover for such damage without specially alleging it, as well as the pain and disability which followed." This language is quoted with approval in *Croco v. Railroad Co.* (Utah) 54 *Pac.* 985, 44 *L. R. A.* 285, in which the rule just stated is sustained both by reasoning and authorities. This exception is overruled.

The fourth, fifth, sixth, and seventh exceptions were argued together, and are as follows: "(4) Excepts because the presiding judge erred in overruling defendant's objection to, and

Same—Defective  
Coupling Appli-  
ances—Pleading  
and Proof.

allowing the plaintiff to answer, the question, 'One engaged in the service you were, as coupler; is it usual to furnish them with any implement,—anything to work with; a car coupler or stick?

Answer. Yes, sir; the Southern road requires you to use sticks.' Such evidence, it is submitted, was irrelevant to any issue raised by the pleadings. The evidence admitted was as to a charge of negligence not covered by the allegations of the complaint. (5) Excepts because the presiding judge erred in allowing plaintiff to testify, against the objection of defendant, that he had not been furnished with any coupling stick. For the same reason as in (4), *supra*. (6) Excepts because the presiding judge erred in overruling defendant's objection to, and allowing the plaintiff to answer, the question: 'After this accident happened, and your arm was crushed, were you asked about any coupling stick, or to receipt for one? Answer. Yes, sir.' For the same reason stated in (4), *supra*. (7) Excepts because the presiding judge erred in allowing plaintiff to testify, over the objection of defendant, that the yard master who hired him, and under whose direction he was, tried to get him to receipt for a coupling stick. For the same reason as stated in (4), *supra*, and that the authority of such yard master had not been shown." These questions arose as follows, when the plaintiff was recalled, to wit: "Q. One engaged in the service you were, as coupler; is it usual to furnish them with any implement,—anything to work with; a car coupler or stick? A. Yes, sir; the Southern road requires you to use sticks. Mr. Abney: We object. Has no bearing on this issue at all. The charge is, he went in there to

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couple. No charge of negligence that we did not furnish him with implements. The Court: I think it competent. Q. by Mr. Nelson: Were you furnished with any coupling stick? A. No, sir. Q. After this accident happened, and your arm was crushed, were you asked about any coupling stick, or to receipt for one? A. Yes, sir. Mr. Abney objected. The Court: 'Coupling appliances' would embrace set of appliances. It is for the jury to say what a set of coupling appliances consists of or embraces. If any part of a safe or complete set of coupling appliances was missing, it would be a defective set of coupling appliances. I will allow the question. Competent. Q. by Mr. Nelson: State what request was made of you in reference to coupler afterwards? Mr. Abney: I add the further objection: Counsel has not shown that any such effort was made by any authorized agent of the company in the scope of his authority. Q. by Mr. Nelson: Was any effort made to secure from you a receipt for a coupler by any authorized officer of the company after the accident? Mr. Abney: We object. The authority must appear. Q. by Mr. Nelson: Did the yard master, who hired you, and under whose direction you were, try to get you to receipt for one? A. Yes, sir." The questions raised by these exceptions are satisfactorily disposed of by the remarks of his honor the circuit judge when he overruled the defendant's objection to the introduction of said testimony. The exceptions are overruled.

The eighth exception is as follows: "Excepts because the presiding judge erred, as a matter of law, in overruling defendant's motion for nonsuit upon the ground that the only inference from the evidence for plaintiff was that plaintiff knew of the defect in the coupler, and after such knowledge assumed the risk of using the same, whereas, plaintiffs' evidence (capable of but one inference) having shown that the defect complained of was open and obvious, and not hidden, and that plaintiff knew of it, and after such knowledge undertook to use it, he should not recover for any injury resulting therefrom." The record contains the following relative to the motion for nonsuit: "Mr. Thompson:-The defendant submits a motion for nonsuit upon the ground that the plaintiff voluntarily assumed the risk of going in between those cars; that the danger was obvious; that there was no latent defect whatsoever. The chain to the lever is the defect complained of. He testified that, as he went down to the edge of the car, he saw this defect; that he knew at the time that a coupling was to be made; that the engine was moving backward from Gervais street, with seven cars attached to the front of it. He saw this defect, and in the face of it went in to make this coupling. He is corroborated in that by his witness Alex. Nelson, who says he saw this defect from the end of the car. He saw the chain was broken before he went in between the cars, and there can be but one inference from the testimony adduced,—that

Same—Same—  
Assumption of  
Risk.

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it was an obvious defect, and that he voluntarily assumed that risk; for he says positively himself that no one ordered him into that place of danger. (Argued.) The Court: It is true, a servant does assume the ordinary risks of his employment, and cannot hold his employer responsible for injuries arising from the ordinary risks, because he assumes that. That is a principle of law. Now, the question whether he assumed extraordinary risk or not is a question for the jury. (Motion overruled.)" In the case of *Bussey v. Railway Co.*, 52 S. C. 438, 30 S. E. 477, the court says: "It is the duty of the master to provide suitable machinery and appliances, and to keep them in proper repair. The employee has the right to assume that the master has discharged his duty in this respect, and is not bound to exercise care in ascertaining whether the master has so acted. When, however, the employee has knowledge or receives warning that the master has not furnished suitable machinery, or that it has not been kept in proper repair, so that it becomes dangerous, and he continues to use the same after such knowledge or warning, then it is a question to be determined by the jury whether, under the circumstances, the employee failed to exercise ordinary care and prudence, and was thereby guilty of negligence." Mr. Justice Jones, in delivering the opinion of the court in *Mew v. Railway Co.*, 55 S. C. 90, 32 S. E. 828, uses this language: "Whether the matter of assumption of risk by an employee is to be tested by the law of waiver (*Hooper v. Railroad Co.*, 21 S. C. 541) or the law of negligence (*Bussey v. Railway Co.*, supra), in either case it is a question of fact for the jury." We are satisfied that the testimony was susceptible of more than one inference, and therefore the case was properly submitted to the jury. But section 15, art. 9, of the constitution sets at rest any doubts that might be retained on this question. It provides that "knowledge by an employee of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby, except as to the conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them." In other words, that, where an employee is injured while voluntarily operating machinery after knowledge of its unsafe condition, his action for injury caused thereby shall not be defeated by reason of this fact. The word "defense" is not used in its technical sense. The words "shall be no defense to an action" are to be understood as meaning "shall not defeat an action." The constitution did not intend to deal with pleadings, but with a principle of law. It did not intend that a defendant on a motion for nonsuit should get the benefit of a state of facts which the constitution declared should be no defense to the action. The object of this provision was to take from a defendant that failed to furnish suitable machinery the right to defeat an action by the employee by

Same—Same—  
Same—Construction  
of Statute  
Providing That  
Knowledge of  
Defect Shall Be  
No Defense.

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showing that he did not act with due care, in voluntarily operating the machinery after knowledge of its defective condition. The only ground of the motion for a nonsuit was the fact that the plaintiff operated voluntarily the defective appliances after knowledge of their unsafe character, which, we have shown, could not defeat the plaintiff's action. This exception is overruled.

The ninth exception is as follows: "(9) Excepts because the presiding judges erred in refusing to allow the witness D. S. Gilliard to answer the question propounded to him by defendant's attorney, 'Is that your notation?'"

**Harmless Error.**

Such question being competent and relevant to show the care used by defendant in the inspection of one of the cars between which (as defendant, by its evidence, undertook to prove) the plaintiff was injured, and bearing directly upon the question whether the coupler thereof was defective; the report to which the question referred being the original report of the conductor of the train which brought said car into Columbia, and whose duty it was to note all defects on said report." It is a sufficient answer to this exception to state that this testimony was afterwards admitted. This exception is overruled.

The tenth exception was abandoned.

The eleventh exception is as follows: "(11) Excepts because the presiding judge erred in refusing to charge the defendant's second request to charge, which was as follows: 'If the

**Instructions.**

jury find from the evidence, if there be such evidence, that the cars between which plaintiff is alleged to have been injured were foreign cars (i. e. cars of another company than the defendant company), then it is only required of the defendant to make an ordinary and reasonable inspection of such cars, for any defects which may be discernible by an ordinary examination.' It is submitted that said request should have been charged unqualifiedly, as it contained a correct statement of the law applicable to the case, and properly drew the distinction between the duty of the defendant with reference to foreign cars and cars of its own; showing that as to foreign cars the duty of the railroad company was not that of furnishing proper machinery for service and keeping the same in repair, but it is one of inspection only, and was performed when the defendant had made a reasonable inspection of such foreign cars for any defects which might be discernible by an ordinary examination. The charge of the presiding judge with reference to said request was erroneous, in that it ignored the distinction sought to be made, and drew a comparison only as to the inspection of the respective cars, leaving the general propositions of law as to master and servant, as stated in his charge, to apply alike to foreign cars as well as cars of its own." In the first place, there was no testimony from which the jury had the right to infer that they were foreign cars; and, in the second place,



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the proposition embodied in the request was not sound. The language of Mr. Chief Justice Simpson, who delivered the opinion of the court in Wallingford v. Railroad Co., 26 S. C. 258, 2 S. E. 19, is applicable to this case. He says: "The responsibility of a common carrier is to transport safely and securely, which includes, as to railroad common carriers, the necessity of having safe appliances, cars, machinery, etc., and we know of no principle of law which would allow them, when damage is done by a defective car, to shield themselves upon the ground that said car belonged to and was used by another company. When the car here was received by the defendant, it was adopted as a part of defendant's train, and defendant then became as fully responsible for its character, etc., as if it was its own car." It is true, that was not a case involving the relation of master and servant. The law, however, requires a master to furnish suitable appliances for his employees, and we see no reason why he should shield himself behind the fact that they were the property of some one else. This exception is overruled.

The twelfth exception is as follows: "(12) Excepts because the presiding judge erred in refusing to charge the defendant's third request to charge, which was as follows: '(3) It was the duty of the plaintiff, Youngblood, to know whether there was anything in the construction of the couplers in question requiring more care than was required in an ordinary case of coupling, if he had a reasonable opportunity to discover the fact, provided these things were open and obvious and not hidden. If he had such knowledge, or ought to have it, as just stated, then you will consider the existence of such knowledge, in ascertaining whether he exercised the care which an ordinarily prudent man would exercise under the circumstances. If he had and did not, he cannot recover.' It is submitted that said request contained a correct principle of law applicable to the case. It undertook to state the law,—that it was proper for the jury to consider the fact, if it had been proven, that plaintiff was aware of the defect in the coupler, with a view to determining whether or not he exercised due care under the peculiar circumstances that surrounded him,—whereas, the presiding judge refused the same because it did not go far enough in stating the doctrine of contributory negligence, as to which he had already charged the jury, nor the consequences of contributory negligence." In refusing the request, the presiding judge said: "That proposition is also faulty, in that it does not go far enough in stating the doctrine of contributory negligence, nor the consequences of contributory negligence. Contributory negligence in the plaintiff, Youngblood, could not be a defense to the action unless it is the cause, either entirely or as one of the proximate causes, of the injury; and so, however negligent he may have been;

Same—Liability  
for Defects in  
Foreign Cars.

Same—Contributory  
Negligence  
—Proximate  
Cause.

either in failing to inform himself, or in acting upon the knowledge which he had, or in failing to act upon it, unless such negligence did contribute to the injury, it is not a defense against the plaintiff's action; and so the court is bound to refuse to charge you that proposition." Not only was this a good ground for refusing the request to charge, but it was in conflict with the doctrine announced in the case of *Bussey v. Railway Co.*, supra. Furthermore, the only fact upon which the defendant relied to show that the plaintiff did not act with due care was that he voluntarily operated the appliances after knowledge of their unsafe condition, and, as we have stated, this could not defeat his action. This exception is overruled.

The thirteenth exception is as follows: "(13) Excepts because the presiding judge erred in charging from plaintiff's second request the following: A servant assumes all risks

Same—Assump-  
tions of Risk from  
Defective Ma-  
chinery.

except those which flow from the master's negligence in his duty in furnishing safe machinery and in keeping the same in repair.' For it is submitted that such charge is erroneous, in that it recognized no difference between latent and patent defects in the machinery. It was further erroneous, in that it should have been modified by adding that if there was a defect in the machinery or appliances, which was open and obvious, and of which the servant had knowledge, then the servant assumes the risk from such defective machinery or appliance. It was further erroneous in that it was not made applicable to foreign cars, and the duty of the master with reference thereto; such duty being only that the same shall receive a reasonable inspection." The charge stated correctly the general proposition of law. If the defendant desired a charge upon a specific proposition, it should have presented requests to that effect. The other grounds of alleged error are disposed of by what was said in considering the other exceptions. This exception is overruled.

The fourteenth exception is as follows: "(14) Excepts because the presiding judge erred in charging plaintiff's fifth request to charge, which was as follows: 'Knowledge by any

Same.

employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby,—such as injury resulting from a defective switch, coupler, or other appliance in use by railroad companies.' It is submitted that such charge was erroneous, in that it excluded the defense, under such constitutional provision: (1) That the servant might assume the risk by remaining in the service of the master after knowledge (if proven) of defective machinery or appliances within the obligation of the master to provide against, and thus waive the obligation of the master; (2) that if the employee has knowledge that the machinery is defective, so that it becomes dangerous, and he continues to use the same after such knowledge, the jury may

## Notes

say whether such employee failed to exercise ordinary care and prudence, and was thereby guilty of negligence precluding a recovery." The charge is in the language of the constitution, which has already been construed, except the last sentence, which was merely illustrative and applicable to the case. This exception is overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

## NOTES.

**EVIDENCE OF PLAINTIFF'S DOMESTIC RELATIONS, THE NUMBER OF HIS CHILDREN, ETC., IN ACTIONS FOR PERSONAL INJURIES.**

**General Rule.**—In an action to recover damages for personal injuries sustained by plaintiff, neither the number and ages of his children, nor that he has a family dependent upon him can be shown for the purpose of enhancing damages.

*United States.*—*Pennsylvania R. Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141.

*Alabama.*—*Louisville & N. R. Co. v. Binion*, 107 Ala. 645, 18 So. Rep. 75.

*Illinois.*—*Chicago v. O'Brennan*, 65 Ill. 160; *Pittsburg, Ft. W. & C. Ry. Co. v. Powers*, 74 Ill. 341; *Village of Warren v. Wright*, 5 Ill. App. 429; *Chicago & A. R. Co. v. Few*, 15 Ill. App. 125; *City of Joliet v. Conway*, 119 Ill. 489, 10 N. E. Rep. 223.

*Kansas.*—*Kansas Pac. Ry. Co. v. Painter*, 9 Kan. 620; *City of Parsons v. Lindsay*, 26 Kan. 426.

*Maryland.*—*Stockton v. Frey*, 4 Gill (Md.) 406, 45 Am. Dec. 138.

*Massachusetts.*—*Shaw v. Boston, etc., R. Corp.*, 8 Gray (Mass.) 45.

*Missouri.*—*Mahaney v. St. Louis & H. Ry. Co.*, 108 Mo. 191, 18 S. W. Rep. 895; *Stephens v. Hannibal & St. J. R. Co.*, 96 Mo. 207, 9 S. W. Rep. 589, 9 Am. & St. Rep. 336; *Daharsh v. Hannibal & St. J. R. Co.*, 103 Mo. 570, 15 S. W. Rep. 554, 23 Am. St. Rep. 900.

*Ohio.*—*Galion v. Laner*, 55 Ohio St. 392.

*Pennsylvania.*—*Pennsylvania R. Co. v. Books*, 57 Pa. St. 339, 98 Am. Dec. 229.

*South Carolina.*—*Johns v. Charlotte, C. & A. R. Co.*, 39 S. Car. 162, 117 S. E. Rep. 608, 39 Am. St. Rep. 709, 20 L. R. A. 520.

*Tennessee.*—*Louisville & N. R. Co. v. Gower*, 85 Tenn. 465, 3 S. W. Rep. 824.

*Texas.*—*Dreiss v. Friedrich*, 57 Tex. 70.

*West Virginia.*—*Moore v. City of Huntington*, 31 W. Va. 842, 8 S. E. Rep. 512; *Crouse v. Chicago & N. W. Ry. Co. (Wis.)*, 14 Am. & Eng. R. Cas., N. S., 780.

*Wisconsin.*—*Kreuziger v. Chicago & N. W. Ry. Co.*, 73 Wis. 158, 40 N. W. Rep. 657.

In an action for injuries sustained by plaintiff while riding on defendant's cars as its passenger, evidence of the number and ages of his children is irrelevant. *Pennsylvania R. Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141. In this case it was said in delivering the opinion: "There was an error committed upon the trial, to which exception was duly taken, but which does not seem to have been remedied by any portion of the charge

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appearing in the bill of exceptions. The plaintiff was permitted, against the objection of the defendant, to give the number and ages of his children: a son ten years of age, and three daughters of the ages respectively of fourteen, seventeen and twenty-one. This evidence does not appear to have been withdrawn from the consideration of the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support and, consequently, that his injuries involved the comfort of his family. This proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted; that is, beyond what was, under all the circumstances, a fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family, it is impossible to determine with absolute certainty; but the reasonable presumption is that it had some influence upon the verdict."

In an action for personal injuries sustained by plaintiff evidence as to the ages and number of plaintiff's children is not admissible. *Williams v. St. Louis & S. F. Ry. Co.*, 123 Mo. 573, 27 S. W. Rep. 387. In this case the court said: "But it becomes necessary to reverse the judgment, because of the admission of evidence of the number of plaintiff's children and their ages against the objection and exception of defendant. The admission of such testimony has been positively disapproved by this court. *Stephens v. Hannibal, etc.*, R. R. Co. (1888), 96 Mo. 207, 9 Am. St. Rep. 336; and by other courts: *Pennsylvania Co. v. Roy* (1880), 102 U. S. 451, 1 Am. & Eng. R. Cas. 225; *Kreuziger v. Chicago, etc.*, Ry. Co. (1888), 73 Wis. 158; *Dreiss v. Friedrich* (1882), 57 Tex. 70; *Pittsburg, etc., Ry. Co. v. Powers* (1874), 74 Ill. 341."

In an action for personal injuries the fact that plaintiff is married cannot be shown for the purpose of enhancing his damages. *Kansas Pac. Ry. Co. v. Painter*, 9 Kan. 620.

Where an employee sues for a personal injury, it is error to admit evidence that he was a man with a family dependent upon him, and unable to support them since the injury. *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 Ill. 341; *Illinois C. R. Co. v. Zang*, 10 Ill. App. 594.

In an action for personal injuries, evidence that the plaintiff is a married man and has a family is improperly admitted, and a new trial will be granted because of such error if the court are of the opinion that it had the effect of increasing the damages. *Stephens v. Hannibal & St. J. R. Co.* (Mo.), 38 Am. & Eng. R. Cas. 110, 96 Mo. 207.

In *Stockton v. Frey*, 4 Gill (Md.) 406, 45 Am. Dec. 138, an action to recover damages for injuries sustained by plaintiff by the upsetting of a stage in which he was riding as defendant's passenger, it was held that evidence showing that plaintiff had a wife and several small children was not admissible for the purpose of enhancing the damages, the court saying: "If, in an action of this character, it be legal to offer evidence of the relations of husband and wife, and father and child, by way of augmenting the damages, it would be difficult to determine, what relations in civil and social life might not be offered for the same purpose.

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If the argument be, that the party injured is thereby rendered unable to discharge the obligations which he owes as husband and father, why may not the same argument apply to the relation of debtor and creditor, guardian and ward, and many others? In all of these relations, there is both a legal and moral obligation, and to sanction such a distinction in this case, would be to establish an uncertain and dangerous doctrine."

**Same—Absence of Gross Negligence.**—In an action against a city for personal injuries sustained by plaintiff because of a defect in a street, where there is no gross negligence, the fact that plaintiff is financially embarrassed, and suffers great anxiety on the subject of the future support of his family cannot be shown to enhance his damages. *City of Parsons v. Lindsay*, 26 Kan. 426.

**Admission of Such Evidence as Harmless Error.**—In *Hewitt v. Flint & P. M. R. Co.*, 67 Mich. 61, 34 N. W. Rep. 659, an action for personal injuries sustained by plaintiff, it was held that: "No harm to the defendant could have resulted from the allowance in evidence of the fact that plaintiff had a family, and resided with them. Though immaterial and irrelevant to the issue, the fact would have been known by the jury, without doubt, had the question not been allowed. I know of no rule that would have prevented the plaintiff attending court during the trial surrounded by his family had he chosen to do so; and I know of no means that could have been taken in such case to have prevented the jury from ascertaining that he had his family with him in court."

The plaintiff testified that she was a widow and had six children. *Held*, this testimony was immaterial and irrelevant to the issue, but, inasmuch as it appears that the damages found by the jury are not in excess of what was fully warranted by the legitimate evidence, this, under the special circumstances of this case, is not a reversible error. *Moore v. City of Huntington*, 31 W. Va. 842, 8 S. E. Rep. 512. See also, *Gulf, etc., R. Co. v. Norfleet*, 78 Tex. 321.

In an action for personal injuries, it was not material error to allow the plaintiff to testify under objection that he had a wife and three children, if the jury was properly instructed as to what should be considered in ascertaining the measure of damages and did not appear to have been influenced by the evidence objected to. *Central Pass. R. Co. v. Kuhn*, 86 Ky. 578, 32 Am. & Eng. R. Cas. 16, 6 S. W. Rep. 441, 9 Am. St. Rep. 309.

In an action for personal injuries the error of allowing plaintiff to testify as to his pecuniary condition, and that he has a wife and one child, may be rendered harmless by an instruction that the jury must disregard it. *City of Kinsley v. Morse*, 40 Kan. 577, 20 Pac. 217.

In an action to recover for such injuries the admission of testimony by plaintiff as to the number and character of his family is harmless error where the court subsequently properly instructs the jury as to the measure of damages. *Johns v. Charlotte, etc., R. Co.*, 58 Am. & Eng. R. Cas. 175, 39 S. Car. 162, 17 S. E. Rep. 698, 39 Am. St. Rep. 700, 20 L. R. A. 520. It was said in the opinion: "Exception 3 alleged error in the ruling of the judge, in allowing the plaintiff to testify, over the objection of the defendant, how many people he had to care for; and of whom they consisted." If the testimony had gone further in the line indicated, it might have become error; but, as it stopped simply at the number and

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character of his family, we think it was wholly immaterial, and could not affect the result, especially as the judge charged as follows: "Now, in a case where the railroad company was guilty of any gross and reckless disregard of the lives and persons of people, juries are allowed to give what you call 'punitive damages,'—go beyond actual damages, and give damages by way of punishment."

## AUTHORITIES CITED AS OPPOSED TO GENERAL RULE.

In seeking to recover for personal injuries plaintiff may introduce evidence to show his condition in life and that of his family to enable the jury to estimate the amount of his damages. *Winters v. Hannibal & St. J. R. Co.*, 39 Mo. 468.

But, see *Stephens v. Hannibal & St. J. R. Co.*, *supra*, where the contrary doctrine was sustained, and the court said: "Some countenance, it may be thought, is given for the admission of such evidence by what is said in *Conroy v. Vulcan Iron Works*, 75 Mo. 652, and in *Winters v. Hannibal, etc., R. Co.*, 39 Mo. 475. In the case last cited, and upon which the other is based, the evidence as to the number of children had been withdrawn, and the remarks about the competency of the evidence were wholly unnecessary. Besides, there was no claim in that case, as here, that the damages were excessive."

In *Alberti v. New York, etc., R. Co.*, 43 Hun (N. Y.) 421, an action for personal injuries sustained by plaintiff, it was held that evidence was admissible to show that plaintiff supported himself and his wife solely by his own earnings. But on a subsequent appeal, (41 Am. & Eng. R. Cas. 201, 118 N. Y. 77, 23 N. E. Rep. 35, 27 N. Y. S. R. 421) the court said in the opinion: "The plaintiff and his wife gave testimony to the effect that he was dependent upon his earnings for the support of himself and wife. This was given under the objection and exception of the defendant. As bearing upon the question of damages, we think this testimony was incompetent."

In *San Antonio & A. P. Ry. Co. v. Robinson*, 73 Tex. 277, 11 S. W. Rep. 327, an action for personal injuries sustained by plaintiff while a passenger on defendant's cars, it was held that evidence was admissible to show that plaintiff had a wife and four children.

In an action by a married woman against a city to recover damages for her personal injuries caused by a defective sidewalk, instructions were given expressly limiting the right of recovery to such damages as were sustained by plaintiff alone. *Held*, that it was not error to allow plaintiff to testify that she was the mother of eight children, who, with the father, were living with her, and that it had been her habit to do the housework for the entire family. *City of Joliet v. Conway*, 119 Ill. 489, 10 N. E. 223. The ground for this holding, however, was that the evidence tended to show plaintiff's ability to labor prior to the accident.

**Damages Arising from Existence of Family Dependent on Plaintiff Are Special.**—In *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339, 98 Am. Dec. 229, it was said in the opinion: "The fourth error assigned is, that the learned judge erred in admitting evidence of the number of plaintiff's family, his habits, industry, and economy, as affecting the question of damages. In *Laing v. Colder*, 8 Pa. St. 479 [49 Am. Dec. 533], it was ruled, in a case of injury to the person, that damages sustained

## Work v. Chicago, etc., Ry. Co

'by the plaintiff from the circumstance of his being the head of a family dependent upon him have no necessary connection with the injury. Such damages may or may not follow a temporary bodily disability. Damages of this nature are therefore not direct or necessary, but special, as being possible only, and must be specially averred to let in evidence of them."

## WORK

v.

## CHICAGO, M. &amp; ST. P. RY. CO.

*(Circuit Court of Appeals, Seventh Circuit, January 16, 1901.)*

[105 Fed. Rep. 874.]

**Railroad—Personal Injuries—Crossing—Contributory Negligence—Duty to Look and Listen.\***—Plaintiff, driving his team behind that of another, approached a railroad crossing consisting of three tracks, and at a place where the view was unobstructed. A train was passing, which stopped plaintiff and the team preceding him; and, after the train had passed, the flagman left the track to turn the semaphore, it being disputed whether or not he waved his flag in warning. The first team crossed the track, and plaintiff, who could not view the track, because of a canopy covering over his seat, unless he projected his head, started to follow. When his horses were stepping on the third track, the flagman ran in front, striking them with the flag, and calling to plaintiff to back them, which he refused to do, but ordered the flagman to let him off the crossing; and then, on seeing the train approaching, urged the horses forward, so that the train struck the wagon and injured plaintiff. At the time the flagman left the track the train was 1,200 feet away, and was giving loud and repeated signals. *Held*, that plaintiff could not recover, as there was no negligence on defendant's part, and plaintiff was guilty of negligence in not looking and listening.

GROSSCUP, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

The plaintiff in error brought suit to recover for injuries sustained from collision with a train of the defendant in error at the crossing at Kedzie avenue, in the city of Chicago, on December 23, 1896, between 3 and 3:30 p. m. That avenue is laid out practically north and south, and is situated in the northwestern part of the city, remote from any business or residence district. For some distance both north and south of the crossing the country was at the time of the accident an open prairie, treeless and houseless, with the exception of a one-story lime house east of the street and south of the road—

\*See generally, *Smith v. Boston & M. R. R.* (N. H.), 19 Am. & Eng. R. Cas., N. S., 320, and *foot-note*.

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way. The railway grounds were fenced, and a flagman was stationed at the crossing. The facts with respect to the collision were testified to by the plaintiff below and by four witnesses called by him. At the conclusion of the plaintiff's case the court directed a verdict for the defendant, upon which ruling error is assigned, and to review which the plaintiff sues out this writ of error. The facts disclosed by the evidence were these: Upon the day in question Work was traveling north on Kedzie avenue, driving a team attached to a heavy two-horse tank wagon carrying oil. The tank was of quarter-inch boiler iron, bolted down on stringers running lengthwise of the wagon. The tank was about 3 feet in diameter, 10 feet in length, and contained at the time 195 gallons of oil. Over the driver's seat, there was a hood or covering, like a canopy top, fastened to the seat, and which prevented the driver from looking out to his right or left, except by projecting his head beyond the hood. Upon arriving at the crossing in question, he found that a train of empty coaches was passing the crossing quite slowly to the southeast, the railway tracks running northwesterly and southeasterly across the avenue. In front of him were two men in a wagon and leading two cows, waiting for the passing of this train. Work stopped alongside and a little to the rear, 20 feet or more, from the nearest rail. After the passage of the coach train, his view of the crossing and street immediately in front of him was unobstructed. He was 40 years of age, and had been acquainted with this crossing for 2 years, passing it daily. The crossing was occupied by three tracks of the railway company, each 10 feet apart, and each 4 feet 8 inches in width. The south track was a spur or switch track; the two northerly tracks being the main tracks of the railway, on the south one of which the train of coaches was passing southeasterly. The roadway for its whole width as planked between the tracks and between the rails. The flagman's shanty was just west of Kedzie avenue and northeast of the northerly track. Two men in a wagon coming south on Kedzie avenue had stopped north of the railway to await the passing of the train, the flagman being stationed at about the center of the avenue, and just north of the most northerly rail. Upon the passing of the coach train the flagman in the street at the north of the railway track, according to the evidence of the two men awaiting in the street at the north, waved his flag to stop the approach of teams from the south, and ran to his shanty to turn the semaphore to notify a passenger train approaching from the southeast that the line was clear. The two men who were in the wagon deny that the flag was waved. One of them testifies as follows: "After the last car of the coach train had gone to the southeast, and had cleared the crossing, the first thing I saw on the north of the tracks was the flagman standing in the middle of the road with his flag. After that he turned and ran over towards the shanty, and I paid no atten-



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tion to him, but started up to drive across the tracks." Work testified that he first saw the flagman at the west side of the street, at or near the curb, walking towards the shanty. As soon as the coach train passed the crossing to the southeast, those in the other wagon started to cross the tracks, and Work followed. Neither those men nor Work testified that the conduct of the flagman influenced them or him to go forward. The two men and the cattle passed the tracks in safety. Work had gotten upon the middle of the three tracks when the flagman ran back along the northerly track, waving his flag to stop Work, and when in front of Work's advancing team struck the horses in the face with the signal flag, and shouted to Work to go back. One of the horses, as Work stated, "was rather touchy about the head, and flew back. The other did not so much. I hollered at him to let me off the crossing. He did not say anything to me, but kept slashing my horses. I looked to the west, could not see anything coming, and hollered at him the second time to let me go on. Failing to do it, I just turned, and looked out to the east, and saw the train coming. My team was then on what would be the up track, and I seen it was either my team or I get killed or get off the crossing. I could not back up quick enough; could get across quicker than I could get either way; and hollered at my horses right sharp. They jumped, and I got almost across, and engine struck rim of hind wagon wheel and end of tank." On cross-examination he testified that when the flagman got in front of his horses and waved his flag "their front feet were then right on the north track"; that he did not attempt to obey the flagman, but hollered to him to let him off the crossing. At this time Work, as he testified, did not know—what the flagman knew, and all the other witnesses saw—that a passenger train was approaching the crossing from the southeast on the northerly track. This train announced its approach by several sharp whistles at the overhead boulevard crossing, 1,200 feet way, and at the Chicago avenue crossing, 875 feet away, and the engine bell was being constantly sounded. It does not appear that Work, either before or after he started to cross, looked or listened for a train until during his altercation with the flagman, and then he saw the train 100 to 150 feet distant from the crossing. When the flagman left the semaphore and ran upon the track towards Work, the train was at about the overhead boulevard crossing, 1,200 feet distant, and Work's team was not then upon the northerly track, the preponderance of the evidence placing them upon the middle track at the time he was stopped by the flagman and during the altercation. Work cursed the flagman, and started his horse upon the northerly track, and was injured by collision with the coming train; the flagman being compelled to leave the track to avoid the train.

Edward Ryan Woodle, for plaintiff in error.

Charles B. Keeler, for defendant in error.

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Before Woods, Jenkins, and Grosscup, Circuit Judges.

Jenkins, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

Without considering the objection raised to the declaration, and assuming it to be good, the three counts charge the railway company with negligence (1) in carelessly running, managing, and controlling its locomotive engine, and neglecting to keep a competent flagman at the crossing to warn plaintiff of the approach of the train while attempting to pass over; (2) in carelessly running, managing, and controlling the engine and neglecting to ring its bell; (3) the same as the first, with the addition that the company allowed the flagman to leave the crossing, so that he did not give warning when he knew plaintiff was attempting to pass over the crossing, but allowed and invited him to drive across when the train was approaching, and prevented him from leaving the crossing by stopping his horses, so that the plaintiff was compelled to remain thereon until struck, etc. With a possible exception, it is difficult for us to find in the evidence any neglect of duty upon the part of the railway company. The crossing was in the outskirts of the city, remote from business and residences; an open prairie, treeless, and, with the exception of a solitary lime house, houseless; there was no need of gates, no strenuous necessity, as in the crowded thoroughfares of a great city, for a prompt passage. Only five travelers gathered here during the time of the approach and passage of the two trains. It is not correct to say that under such circumstances the failure of the railway company to employ two men at the crossing—one at the semaphore and one at the crossing—was a failure in duty. So to hold would impose a degree of care wholly unwarranted by the surroundings. Nor was there negligence in the management of the train. It approached with no immoderate speed, the whistle of the engine was diligently sounded, and its bell was rung, and, when danger appeared to be imminent, the train was promptly stopped. So far as the evidence discloses, a competent flagman was stationed at the crossing, and upon this occasion, with a possible exception, to be noted, diligently discharged his duty. He was at the crossing with his flag as the coach train proceeded southeasterly, giving warning to all travelers upon the highway. Immediately upon the passing of the coach train, as became his duty, he ran to turn the semaphore, giving notice to the passenger train, then coming, of a clear track. There is possible dispute among the four witnesses for the plaintiff whether before or at the time he started for the semaphore he waved his flag and gave warning to those about to cross. A careful scrutiny of the evidence satisfies us that he gave such warning. The two witnesses who were upon the north side of the street positively so assert. The two men in front of Work deny; one, however, in a qualified way. These men were in haste to cross, and seemed to have given but little attention to their

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surroundings upon the passing of the coach train. Work saw and heard nothing. Possibly, in this state of the evidence, notwithstanding it was all produced by the plaintiff, the case should have been sent to the jury if the sole issue was the negligence of the company and its servants. We are satisfied, however, assuming negligence of the flagman, that the conduct of the plaintiff was the producing cause of this injury. If he had the right to assume, from the fact that the two men in front of him started to cross, that the flagman had given the proper signal to cross, still he was not absolved from the watchfulness and care imposed upon one in a place of danger. He would seem to have had no comprehension of the situation, as he was not aware of the presence of the flagman, and first saw him when the latter reached the west side of the street to turn the semaphore. Work was charged with the duty, which was constant upon him until he had safely crossed, to look and to listen. When he reached the middle track, the approaching train which caused the injury was 1,200 feet away, the shrill whistle of the engine being repeatedly sounded, and its bell being rung. It is incomprehensible that in the due and vigilant exercise of his senses in a place of danger he should not have heard these signals when every other witness heard them. He would seem to have followed mechanically the team in front of him, apparently giving no attention except to his team,—“seeing my horses did not go up on the cattle in front of me.” Had he been observing, he could have seen the flagman running down the track from the semaphore, waving his flag in warning of danger; but he does not appear to have noticed him until he saw him in front of his horses waving the flag in their faces. The canopy top obscured his vision along the tracks, and to enable him to see it was necessary that he should project his head beyond the obstruction. This fact imposed upon him the greater care and vigilance. Had he listened and had he looked while still upon the middle track, and in a place where he was safe from the coming train, he could have heard and seen its approach, and have avoided the injury. Beyond all this, the evidence satisfactorily discloses to us that he was on that middle track at the time the flagman confronted him with his flag endeavoring to stop the horses and calling on him to back. He had all the warning that could possibly be given him before he had gone upon the northerly track. He had only to stop, or at most to back his team slightly, and he was safe. But either willfully or in negligent ignorance of his surroundings he entered into altercation with the flagman who had stopped his horses, called upon the flagman to let him pass, and, upon the refusal of the flagman so to do, took time to look to the west, and, seeing no train, again demanded of the flagman that he get out of the way, and, the flagman failing to comply, looked to the east, and saw the coming train within 150 feet of him. Cursing the flagman, and demanding that he be

allowed to pass, he shouted to his team, and attempted to cross in front of the train. Had he obeyed the flagman, and taken note of the warning, he would have been safe. We can conceive of no excuse for his conduct. It certainly does not comport with the care which the law demands of one attempting to cross a place of danger. We perceive no failure of duty on the part of the railway company or its servants which should impose liability, unless, indeed, railway companies are to be held as guarantors of the safety of all travelers over crossings. We are satisfied that, had the case been submitted to the jury, and a verdict rendered for the plaintiff, it would have been the clear duty of the court to have set aside the verdict; and in such cases it is proper to instruct the jury to find for the defendant. *Pleasants v. Fant*, 22 Wall. 122, 22 L. Ed. 780; *Bowditch v. City of Boston*, 101 U. S. 18, 25 L. Ed. 980; *Treat Mfg. Co. v. Standard Steel & Iron Co.*, 157 U. S. 674, 15 Sup. Ct. 718, 39 L. Ed. 853.

Grosscup, Circuit Judge (dissenting). I am reluctantly compelled to dissent from this opinion. The conduct of the plaintiff below, on the inquiry respecting contributory negligence, must be surveyed, not from the point of view of the flagman, or of the people across the track, but from the point of view of the plaintiff himself. It was his judgment—made up through his own eyes and ears—that governed him; and, so far as contributory negligence is concerned, he can not be held to an exercise of judgment such as might have followed upon another environment.

What, then, was the state of things occurring that day, as they presented themselves to him? Arriving at the railroad crossing, the plaintiff in error found himself behind a wagon already stopped by the flagman. A train going into the city was seen to be the cause of the obstruction. When the train had cleared the track it continued to hide the view toward the city as far as the boulevard crossing, beyond which, an embankment intervening, no further view was obtainable. The street was itself, so far as he could see, clear for passage, and as to danger from the direction of the city, his safety, so long as the ingoing train intervened, lay either in remaining where he was, or putting faith upon the outlook of the flagman.

At this moment the flagman left the track, and proceeded toward the shanty. The occupants of the wagon in front—though no inquiry to that effect was made of them on the trial—doubtless accepted this as a signal of safety, and started to cross. The plaintiff in error followed, and though those preceding got over in safety, was caught by an outgoing train suddenly emerging from behind the ingoing train. Had he disregarded the flagman, acting wholly upon his own outlook, he probably would have remained where he was, until the ingoing train had ceased to obstruct his view, and would thus have escaped injury. Relying undoubtedly, however, upon

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the flagman to make up for his own defect of outlook, he was led upon the track, and received the injury.

There is no question that a traveller on the highway, approaching a railroad crossing, must use his ears, and look in both directions. The railway is itself a signal of danger. Dependent solely upon his own senses, without aid from others, he must give full exercise to his senses. Had there been no flagman—had the plaintiff in error, by being alone, been required, without aid, to look out for himself—there would be no difference between the opinion of the majority and myself.

But in the case under review the plaintiff in error did not feel himself unaided. By ordinance of the city, a protector had been placed upon the tracks. The plaintiff in error had a right to rely—at least, so far as his own outlook was obstructed—upon the outlook of this protector. The withdrawal of the flagman, as seen by him, and the people in front of him, was notice that the track was clear, and that it was safe to cross. *Railway Co. v. Schneider*, 45 Ohio St. 678, 17 N. E. 321; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843; *Sweeny v. Railroad Co.*, 10 Allen, 368. I do not apprehend that the application of this rule would be disputed if the view of the plaintiff in error cityward had been cut off by some fixed obstruction. In fact the obstruction was not fixed. It was a moving train that would give a clear view as soon as it had gone a little way toward the city. But, does this fact—that the obstruction to the view was temporary—make any real difference? Had it, by reason of its temporariness, any the less an effect upon the mind of the plaintiff in error? Would an ordinarily prudent man, accustomed to rely, where his view as obstructed, upon the outlook of the flagman, stop to think that, on this particular occasion, he could, by waiting, see for himself, and thus avoid the need of reliance upon the flagman?

At most city crossings the necessity for a prompt crossing is strenuous. A long procession of vehicles awaits the opening of the gates, or the signal of the flagman. There can be no such delay—no time for that careful surveillance, on the part of each passer,—as a country crossing admits. There is pressure from both directions on the highway, and from both directions on the railroad. A looker-out, who has no other diversion, is an essential safeguard to the passers on the highway.

The city passer, compelled, under such circumstances, to take his cue from the flagman, falls naturally into that habit. The flagman, habitually, becomes his guide. A busy crossing, in this way, works with the precision of a machine. There is not—and, in the nature of things, cannot be—a large exercise of individual judgment. It is, in my judgment, straining the actual facts to say that a prudent man, thus accustomed to feel his way across these crossings, will, his own view cut off, stop to ask himself if the obstruction is but

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temporary. Will he not, more naturally, press on, as he would at the other crossings? He may, in following this habit, be dull, but the ordinance is for him, as well as for the keenly alert. It is meant for the man who, on similar occasions, is invited to trust to the flagman, as well as for the man who lets no occasion escape to trust any eyes not his own. It certainly was not designed to lead the unwary into an ambushed danger—a consequence that the conduct of this flagman visited upon the plaintiff below.

Nor can I concur that the plaintiff in error's conduct, in refusing to back his team off the track, must be regarded as negligence in law. There was considerable testimony tending to show that his horses had already reached the track on which he was afterwards struck. In this situation—with his horses entering upon the track, and the flagman seen by him, for the first time, in an attempt to stop him—his conduct is described by himself as follows: "After he" (the flagman) "hollered out I looked first to the west; then I looked to the east—my horses were just then entering on the track. That was the first time I saw the passenger train. Should judge its engine was 150 feet away, may be more; could not say, because it was just a glance I got of it. I saw the position I was in and had to get out of it. Did not look for distances. I had to go ahead. Did not use a whip; I hollered at the horses, and they jumped quick." And again, describing his decision to go ahead, and the reasons for it, he said: "Yes, I must get off the track and out of danger; going ahead was the quickest I could get out of danger."

Where a traveller, through the negligence of the railway, is placed in a situation where he must adopt a perilous alternative—or where, in the terror of an emergency, he acts imprudently, even wildly—there can be no imputation of contributory negligence. Beach, Contrib. Neg. § 40. "If," as Lord Ellenborough said, (*Jones v. Boyce*, 1 Starkie, 493.) "I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

The negligence of the railway company consists, primarily, in requiring the flagman to perform two inconsistent functions. He could not, in the nature of things, retire to operate the semaphore, without creating such misunderstanding as would lead on, to their peril, the passers on the highway. The root of this accident is not in the plaintiff in error's failure to exercise a high intelligence, but in the defendant in error's effort to make one man fill, simultaneously, two places at war with each other.

Judgment affirmed.

## MAHER

v.

UNION PAC., D. & G. RY. CO. *et al.**(Circuit Court of Appeals, Eighth Circuit, January 24, 1901.)*

[106 Fed. Rep. 309.]

**Master and Servant—Railroads—Fellow Servants—Negligence—Recovery Precluded.\***—Plaintiff was injured while a fireman on a passenger train, by collision with a freight train, which was backing onto the main track from a siding. Both the freight and passenger were running in the same direction, and both were late, in accordance with the order of the train dispatcher. The freight train reached the station where it took the siding 13 minutes before the passenger was scheduled to arrive, and there orders were received that the passenger was to run 30 minutes late into the next station. Without protecting the rear end of the train with a flag, or sending a brakeman back to warn approaching trains, the conductor of the freight train commenced to back his train onto the main track 5 minutes after the passenger was due to arrive, and the passenger train, coming around a curve in a deep cut from which a view of the freight train was excluded, and approaching the station to receive its further orders, collided with the freight train. A rule of the company required trains of an inferior class to keep 10 minutes off the time of a train of a superior class following it. *Held*, that as the negligence was that of the engineer and conductor of the freight train, and not that of the train dispatcher, a recovery was precluded, since the injury was caused by the negligence of a fellow servant.

In error to the Circuit Court of the United States for the District of Colorado.

J. M. Washburn, for plaintiff in error.

Elmer E. Whitted (Tyson S. Dines, on the brief), for defendants in error.

Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Caldwell, Circuit Judge. Dennis A. Maher, the plaintiff in error, was a locomotive fireman on passenger train No. 2 on the Union Pacific, Denver & Gulf Railway, operated at the time by Frank Trumbull as receiver. On the 3d day of August, 1894, passenger train No. 2 and fast freight train No. 12 were running northward on the same track from Texline, N. M., to Trinidad, Colo.; and at Folsom, N. M., train No. 2 ran into the rear of train No. 12 while the latter train was backing from the siding out onto the main line, and as a result of the

\*As to whether employees of different trains are fellow servants, see *Benignia v. Pennsylvania R. Co.* (Penn.), 20 Am. & Eng. R. Cas., N. S., 487, and *note*, 488 *et seq.*

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collision the plaintiff's legs were cut off, and this action is brought to recover for that injury. The court below, at the close of all the evidence in the case, directed the jury to return a verdict for the defendants.

The case turns upon a single question, namely, whether the collision in which the plaintiff received his injury resulted from the negligence of the conductor and engineer on train No. 12, or from some fault or error in the orders of the train dispatcher to the conductors and engineers of these two trains. If the collision resulted from the negligence or error of the train dispatcher, the defendants are liable (*Railway Co. v. Elliott*, 42 C. C. A. 188, 102 Fed. 96, and cases there cited); but, if it was occasioned by the negligence of the conductor and engineer on train No. 12, they are fellow servants of the plaintiff (*Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Railroad Co. v. Charless*, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; *Same v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994); and by the law of the place where the collision occurred defendants are not liable to the plaintiff for their negligence (*Lutz v. Railroad Co.*, 6 N. M. 496, 30 Pac. 912, 16 L. R. A. 819; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439; *Railroad Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Railroad Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958).

The orders issued to the conductors and engineers of these trains by the train dispatcher are as follows:

"Order Number One.

"For Texline. Conductor and Engineer of Trains Nos. 2 and 12: Train No. 2 will run one hour late Texline to Folsom. Complete 1:55 a. m., No. 12, Grove and Miller; complete 5:20 a. m., No. 2, Mabie and Hinchcliff."

"Order Number Four.

"For Clayton. To Conductor and Engineer Trains Nos. 12 and 2: Order No. 1 is annulled. No. 2 will run one hour and thirty minutes late Clayton to Folsom. M. F. E. Train 12, Grove and Miller, complete 3:01 a. m. Train No. 2 complete, Mabie and Hinchcliff, 5:45 a. m."

"Order Number Eight.

"For Folsom, N. M. To Conductor and Engineer of Nos. 2 and 12: No. 2 will run two hours late Folsom to Trinchera. M. F. E. [Signed] Grove and Miller, Conductor and Engineer."

These orders are shown by the testimony to be in the usual and proper form, free from conflict, and plain and unambiguous in their directions. The schedule time for train No. 12 at Folsom was 6:10 a. m. It arrived there at 7:05, and stopped on a siding to report and receive orders, and while there did receive order No. 8. The schedule time for train No. 2 at



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Folsom was 5:48 a. m., and under order No. 4, directing it to run 1 hour and 30 minutes late from Clayton to Folsom, it was due to arrive there at 7:18 a. m., and it did arrive at 7:25. The fact that No. 2 was, under order No. 4, due at Folsom at 7:18, was known to the conductor and engineer of train No. 12. That was plain and unmistakable from the order they had received, and with full knowledge of this fact, and without protecting the rear of their train by a flag or otherwise, in some sufficient manner, as common prudence as well as an express rule of the company required them to do, they commenced to back their train from the siding onto the main track at 7:23, and the train was still backing when No. 2, coming around a curve in a deep cut, which excluded No. 12 from view, ran into the rear of that train.

At the time the collision occurred No. 12 was backing onto the main line on the time of No. 2, which might be expected at any moment, and this was done without sending a brakeman or flagman the regulation distance, or any distance, to the rear to flag the incoming train. The train dispatcher was in no manner responsible for this culpable negligence. Order No. 8 did not cancel order No. 4, but fixed the arriving time of No. 2 between Folsom and Trinchera at two hours later than its schedule time. The "two hours late," mentioned in order No. 8, is not two hours late from Clayton to Folsom, but from Folsom to Trinchera, and it cannot be construed as authorizing the conductor of No. 12 to assume that No. 2 would arrive at Folsom two hours late, or 30 minutes later than the time fixed in order No. 4. He knew, moreover, that the conductor and engineer of No. 2 had not received order No. 8, and would not receive it until their train reached Folsom. When the conductor of No. 12 received order No. 8, he had an undoubted right to move his train out on the main track, and go forward to Trinchera, knowing that he had 30 minutes to make that station ahead of No. 2. But this order did not authorize him to back his train onto the main track on the time of No. 2 at Clayton, under order No. 4, without taking the usual and necessary precautions to prevent a collision. Moreover, there was a rule of the company providing that "a train of inferior class must in all cases keep out of the way of a train of superior class," and another rule providing that "a train of inferior class must keep ten minutes off the time of a train of superior class following it." These rules were disregarded by the conductor and engineer of train No. 12, which was, within the meaning of these rules, "a train of inferior class" to No. 2.

The train dispatcher did not give any orders to the conductor of No. 12, regulating the movement of his train at Clayton station. How he should move his train there, and whether he should head out or back out of the siding, and what precautions he should take to prevent a collision while moving his train onto the main track, were matters of detail,

concerning which it was the duty of the conductor to conform to the usage and practice in such cases and the rules of the company. Such matters of detail are not regulated, and cannot be regulated, by orders from the train dispatcher. All orders emanating from the train dispatcher are to be received and read in the light of these well-known rules for the movement of trains at stations on and off the sidings, and for the violation of such rules the train dispatcher is not to be convicted of negligence. There is no conflict in the testimony, from which it clearly appears that the cause of the collision was not any fault, error, or negligence on the part of the train dispatcher, for whose negligence the defendants would be liable, but that it was due solely to the negligence of the conductor and engineer of train No. 12, who were fellow servants of the plaintiff under the rules now established by the supreme court of the United States, and for that reason the defendants are not liable to the plaintiff for the results of their negligence. It is conceded that the plaintiff was in the strict line of his duty when he received his injury, and nothing but the common-law fellow-servant doctrine, as that doctrine is construed by the supreme court of the United States, stands in the way of his recovery. That rule is, in the judgment of the writer of this opinion, extremely unjust. This case affords a striking illustration of its cruel injustice. But the rule is too firmly rooted in our federal jurisprudence to be changed otherwise than by legislation. It has been abrogated in a good many jurisdictions, and, in the opinion of the writer, ought to be abrogated in all. The judgment of the circuit court is affirmed.

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SOUTHERN RY. CO.

v.

MAUZY.

*(Supreme Court of Appeals of Virginia, Nov. 22, 1900.)*

[37 S. E. 285.]

**Injury to Employee—Loading Cars—Expert Testimony.**—In an action by an employee against a railroad company for injuries received while loading car wheels on a flat car, it is error to permit witnesses to give opinions as to the best and safest method of loading such wheels, since expert testimony is not necessary to explain the subject under consideration.

**Same—Same—Evidence.**—In an action by an employee against a railroad for injuries sustained while loading car wheels on a flat car, it is error to permit plaintiff to prove, over objection, the manner in which such wheels were loaded by another railroad company, though the skid used in such work was borrowed from such other railroad.

**Same—Care Required of Master in Furnishing Machinery.\***—It is error to charge, in an action by an employee for injuries received, that one of the personal duties of the master is to furnish safe and sound machinery for the use of the servant, since it is his duty to use only ordinary care and diligence to provide reasonably safe and suitable machinery.

**Fellow Servants.†**—An instruction in an action by an employee for injuries sustained, that, if P. was foreman of a certain department, with power to employ and discharge plaintiff, he was not a fellow servant of such plaintiff, is erroneous, where P. was helping plaintiff at the time of the accident.

**Contributory Negligence.**—In an action by an employee for injuries sustained it is error to refuse to instruct that, if the evidence shows that plaintiff contributed towards the accident of which he complained by his own negligence or carelessness, and that such negligence or carelessness was the proximate cause of his injuries, and could have been avoided by the use of ordinary care on plaintiff's part, defendant was not liable.

**Injury to Employee—Assumption of Risk.**—Where an employee of ordinary intelligence was injured while loading car wheels on a flat car by means of an inclined skid, and it was shown that a fellow employee recognized the danger when the wheels had been elevated to a certain height, and stepped aside, escaping uninjured, it is error to refuse to instruct that, if the work was such that by the nature of the employment such employee might be called on to perform, he assumed all risks from causes which were known to him, or which were open and obvious.

Appeal from circuit court, Rockingham county.

Action by Clarence H. Mauzy against the Southern Railway Company. From a judgment in favor of the plaintiff, defendant appeals. Reversed.

Winfield Liggett, for appellant.

Downing & Richards, for appellee.

Harrison, J. This action was brought by Clarence H. Mauzy against the Southern Railway Company to recover damages for injuries alleged to have been sustained by him in consequence of the negligence of the defendant company. At the time of the accident in question, the plaintiff was an employee of the defendant, and was assisting other laborers in loading car wheels upon a flat car. The gravamen of the plaintiff's complaint is that the defendant negligently failed to provide safe and adequate appliances for doing the work in the usual and most approved method.

The court is of opinion that it was error to permit the witnesses James Lewis, John Kelly, and Joseph B. Newman, to

\*See *Clements v. Alabama Great Southern R. Co.* (Ala.), 19 Am. & Eng. R. Cas., N. S., 266, and *foot-note*.

†See *Illinois Cent. R. Co. v. Coleman* (Ky.), 19 Am. & Eng. R. Cas., N. S., 285, and *foot-note*.

testify, over the objection of the plaintiff, as to the best and safest mode of loading car wheels on a flat car. These witnesses were not shown to be experts, or to have had any such experience as would entitle them to express an opinion on the subject. Nor does it appear that expert testimony was necessary to explain or elucidate the subject under investigation. The question of danger or safety in loading car wheels in a particular mode is one which any person of common intelligence and observation could as readily determine as the so-called expert. No principle of law is better settled than that the opinions of witnesses are, in general, inadmissible; that witnesses can testify to facts only, and not to opinions or conclusions based upon the facts. *Hanriot v. Sherwood*, 82 Va. 1; *Hammond v. Woodman*, 41 Me. 177, 66 Am. Dec. 219. To this general rule there are exceptions. The case at bar, however, does not come within their influence. In the valuable note to the case last cited (66 Am. Dec. 228) it is said with abundant authority in its support, that "the competency of expert testimony in a particular case depends upon the question as to whether or not any peculiar knowledge, science, skill, or art not possessed by ordinary persons is necessary to the determination of the matter at issue; \* \* \* that expert testimony is not admissible as to matters within the experience or knowledge of persons of ordinary information, as to which the jury are competent to draw their own inferences from the facts given in evidence before them, without extraneous aid other than the instruction of the court upon questions of law."

The court is further of opinion that it was error to permit the plaintiff, over the defendant's objection, to prove the mode adopted by the Baltimore & Ohio Railroad Company for loading car wheels on a flat car. A witness having sufficient knowledge may testify as to the general practice of railroads in doing the work in question, and the comparative safety of different methods; but it is not competent to show that the different method of another railroad is better than that of the defendant. It is supposed that in such matters even the skillful and experienced will frequently differ in their choice of instrumentalities. A party should not be adjudged negligent for not conforming to some other method believed by some to be less perilous. *Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509. Nor is this rule avoided or varied, as contended, by the fact that the declaration alleges that the skids used by the defendant company at the time of the accident were borrowed from the Baltimore & Ohio Railroad Company, and that said company employed other appliances in connection with such skids when loading a truck, or pair of car wheels, on a flat car; that being the usual, approved, and safe method of performing such work. It was entirely competent to sustain the allegations of the declaration by proof showing that the skids were borrowed from the Baltimore &

Ohio Railroad Company, and what, if any, method was generally adopted by railroads as the best and safest for accomplishing such work. Not a witness, however, was asked as to the usual, approved, and safe method of loading car wheels generally employed, but the sole inquiry was as to the practice adopted by the Baltimore & Ohio Railroad Company, and the usual and ordinary method employed by that company at Harrisonburg.

It appears that the defendant company, in loading car wheels on a flat car, used "skids" joined by two rods, and strengthened by other braces. These skids were placed with one end on the rails and the other on the flat car, forming an inclined plane, up which the car wheels were rolled by men pushing them from behind. The Baltimore & Ohio Railroad Company, for the same purpose, used skids of like character, placed in the same manner; but, instead of the car wheels being pushed up the skids, they were drawn up by means of a rope and chain with one end attached to the truck and the other to an engine. It is contended that, inasmuch as the defendant company borrowed the skids from the Baltimore & Ohio Railroad Company, it was the duty of the defendant company to get all the appliances used by the Baltimore & Ohio Railroad Company for loading car wheels, and not to take a part thereof. This position is not tenable. It appears that the mode of doing the work by the defendant company had been in general use throughout its service for many years; that the skids used on this occasion were in perfect condition; that said skids were a complete instrumentality in themselves, and not dependent upon the rope, chain, and engine for their use. The defendant company was prosecuting the work in hand in its own accustomed way, and was under no obligation to use a rope, chain, and engine because it found that the Baltimore & Ohio Railroad Company employed that method. The question is not what appliances were used by the Baltimore & Ohio Railroad Company, but whether the appliances furnished by the defendant were reasonably safe, sound, and suitable.

The court is further of opinion that it was error to instruct the jury that one of the personal duties of the master was to furnish safe and sound machinery for the use of the servant. This imposes a much higher duty upon the master than the law imposes. It is a general rule of the law of master and servant, repeatedly laid down by this court, that the master shall use ordinary care and diligence to provide reasonably safe and suitable machinery and appliances for the use of the servant, and the master will be held liable for an injury to the servant which results from the omission to exercise such care and diligence. *Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869; *Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *McDonald's Adm'r v. Railroad Co.*, 95 Va. 98, 27 S. E. 821; *Robinson Adm'r v. Dininney*, 96 Va. 41, 30 S. E. 442; *Wheel Co. v. Chalkley*, 98 Va. —, 34 S. E. 976.

The court is further of opinion that it was error to instruct the jury "that if they believed from the evidence that D. W. Prettyman was the foreman of the locomotive department of the defendant company at the time of the injury to the plaintiff, with power to employ and discharge said plaintiff, then the said Prettyman was not a fellow servant with the plaintiff, and any negligence on his part contributing to said injury does not excuse the defendant from such liability in damages to the plaintiff as the jury, under the evidence, thinks him entitled to recover." The error of this instruction was in telling the jury that, if D. W. Prettyman was foreman of the locomotive department, with power to employ and discharge the plaintiff, then said Prettyman was not a fellow servant with the plaintiff.

The question of fellow service is not determined by gradation in employment. The mere fact that one servant is superior in authority to another does not have the effect of changing his relation of fellow servant, unless his superiority places him in the category of vice principal. *Railroad Co. v. Nuckols' Adm'r*, 91 Va. 193, 21 S. E. 342; *Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Railroad Co. v. Houchins' Adm'r*, 95 Va. 398, 28 S. E. 578.

In the case at bar Prettyman was helping to load a pair of car wheels. He was not engaged in any one of the nonassignable duties of the master. Whatever he might be at some other time, and in some other connection, at the time of the accident he was doing the work of a co-laborer with the plaintiff. To furnish reasonably safe appliances being one of the nonassignable duties of the master, it may be conceded that Prettyman was acting as vice principal in borrowing the skids; but this was not the proximate cause of the injury. The proximate cause was getting in between the rails of the skids, which was done at Prettyman's suggestion, and in accordance with his example. In this Prettyman was the fellow servant of the plaintiff. *Jackson v. Railroad Co.*, 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337.

The court is further of opinion that it was error to refuse to instruct the jury that if they believed from the evidence that the plaintiff contributed towards the accident of which he complained by his own negligence and carelessness, and that such negligence and carelessness on his part was the proximate cause of his injuries, and could have been avoided by the use of ordinary care on the part of the plaintiff, then the defendant company is not responsible, and they must so find. No doctrine of the law is better settled than that which pertains to the question of contributory negligence. It is needless to cite authority in its support. A recent case is *Railway Co. v. Marpole*, 97 Va. 594, 34 S. E. 462. The law was correctly stated in the instruction refused, was applicable to the facts of the case, and should have been given.

The court is further of opinion that it was error to refuse to

instruct the jury that if they believed that the work of loading wheels upon cars was such as, by the nature of his employment, the plaintiff might be called upon from time to time to perform, that then the plaintiff assumed all ordinary risks incident to the discharge of his duty, and all risks from causes which were known to him, or which were open and obvious.

It is a well-settled principle that a servant, when he enters the service of a master, assumes all the ordinary risks of such service; and also, as a general rule, assumes all risks from causes which are known to him, or should be readily discernible by a person of his age and capacity in the exercise of ordinary care. *Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869; *McDonald's Adm'r v. Railroad Co.*, 95 Va. 98, 27 S. E. 821; *Robinson Adm'r v. Dininney*, 96 Va. 41, 30 S. E. 442.

In *Shear. & R. Neg.* § 185, it is said that "a railway servant employed to remove damaged cars to a repair shop has no right to complain of injuries suffered from the known defects of such cars; and, where a business is obviously dangerous, and is conducted in a manner which is fully known to the servant at the outset, he assumes the risk of his conduct in that manner, although a safer method could have been adopted." It is contended that there was no evidence upon which to base an instruction involving the doctrine of assumed risk; that the plaintiff testified that he knew of no danger, and suspected none; and that the defendant's witness Prettyman testified that he considered it a perfectly safe method of loading car wheels. The plaintiff was asked, "Were you acquainted with the danger?" etc., and replied: "No, sir. That was not in my mind. I only had in mind to do the work that I was told to do." It makes no difference that the danger was not in the plaintiff's mind; such thoughtlessness is negligence, which cannot be charged to the defendant company. An obvious danger is one that is apparent to a person of ordinary intelligence. There is nothing in the record to suggest that the plaintiff was not a person of ordinary intelligence, and it is inconceivable that such a person would not know that the tendency of a heavy body, when elevated, is to fall; and that one in a position to be struck, if it should fall, runs a risk, and is in more or less danger. The companion who was with him between the skids, when the wheels had been elevated a certain height, recognized the danger, stepped aside, and escaped injury. We think that the instruction asked for upon the question of assumed risk was fully justified by the facts, and should have been given.

For these reasons the judgment of the circuit court must be reversed, the verdict set aside, and the cause remanded for a new trial to be had therein not in conflict with the views herein expressed.

SAX

v.

DETROIT, G. H. & M. RY. CO.

(*Supreme Court of Michigan, Nov. 13, 1900.*)

[84 N. W. 314.]

**Variance.**—Plaintiff alleged, that after sustaining an injury on defendant's road, he entered into a contract with the defendant, whereby he released the company from all liability for damages, and defendant agreed to re-employ him, so long as his services were satisfactory, as a passenger brakeman, at which he had been employed theretofore. The evidence showed that plaintiff had been employed before the injury as a brakeman on a freight train, and was employed thereafter as conductor of a passenger train. *Held*, that there was not a fatal variance between the pleading and the proof, since the variance as to plaintiff's former occupation was immaterial.

**Contract of Employment—Authority of General Superintendents.**—When C., a train master of the defendant company, offered to employ plaintiff on certain terms, and sent him to the general superintendent to complete the agreement, which was consummated by the general superintendent and M., his clerk, the evidence of these three parties as to the contract was not objectionable on the ground that their authority to make such contract was not proven, since in the absence of evidence to the contrary, the general superintendent's authority will be presumed, and proof of authority as to C. and M. was unnecessary, as their testimony was admissible to show a knowledge and ratification by the superintendent of C.'s offer.

**Same—Oral Contract—Validity.**—An oral contract, in which defendant agreed to employ plaintiff as long as his services were satisfactory, was not void as a contract not to be performed within a year, since it might have been performed within that time.

**Same—Consideration—Release of Liability for Personal Injuries.\***—Where defendant agreed to employ plaintiff as a brakeman so long as his services were satisfactory, and plaintiff released defendant from all liability for damages for an injury sustained by him on the defendant's road, the contract of employment was not void for want of consideration, since the promises were mutual and binding.

**Same—Same—Breach of Contract—Damages—Evidence—Mortality Tables.**—Defendant executed a contract to employ plaintiff so long as his services were satisfactory, and plaintiff released defendant from all liability for damages for an injury sustained by him on defendant's road. *Held*, that in an action by plaintiff for damages for breach of the contract of employment it was improper to introduce mortality tables to enable the jury to assess plaintiff's damages, since the defend-

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\*See note at end of case.



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ant had the right to terminate the contract whenever plaintiff's services were not satisfactory.

**Same—Breach of Contract.**—Where the defendant company agreed to employ plaintiff as a brakeman so long as his services were satisfactory, a discharge of plaintiff because a brakeman was no longer needed on the train on which he worked constituted a breach of contract.

Error to circuit court, Shiawassee county; Stearns F. Smith, Judge.

Action by William J. Sax against the Detroit, Grand Haven & Milwaukee Railway Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Geer & Williams (E. W. Meddaugh, of counsel), for appellant.

Watson & Chapman, for appellee.

Hooker, J. The plaintiffs' hand was injured while acting in the capacity of brakeman upon a freight train upon the defendant's railroad, and he was idle for about four months.

**Case Stated.** He then resumed work as a passenger brakeman upon another branch of defendant's road, and worked about four months, when he was dismissed, according to plaintiff's claim, and laid off because the service of a brakeman was dispensed with upon his trains, according to the defendant's contention. He brought this action to recover damages for the breach of a contract which he says was made between the defendant and himself after his injury, whereby, in consideration of a release of a claim for damages upon account of his injury, the defendant promised to give him a permanent position in its employ, which was to last during his lifetime, as long as his services and conduct were satisfactory to the company. The defendant has brought error upon a judgment of \$1,950 in plaintiff's favor.

The first point raises the question of a variance between the declaration and proof. Plaintiff's declaration stated that: "And afterwards, on, to wit, the 15th day of January, A. D.

**Variance.** 1896, said plaintiff and said defendant entered into a contract as follows: Said plaintiff agreed to release all claims against said defendant for damages on account of the above-named injuries in consideration that said defendant would give him re-employment so long as his services and conduct were satisfactory, said plaintiff having been theretofore employed by said defendant as a brakeman on a passenger train, and by the terms of said contract said defendant agreed to re-employ him as such." The proof shows that his previous service was as brakeman on a freight train, while the declaration alleged that he had been employed upon a passenger train. The question was raised at the close of the testimony by a motion to strike out the evidence because the declaration alleged an agreement to employ the deceased

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as a passenger brakeman, while the proof tended to show a promise to employ him as a brakeman on freight trains, or to give him a permanent position. It was also raised upon a request to direct a verdict for the defendant. The declaration explicitly alleges that the defendant promised to employ the plaintiff as a passenger brakeman. Plaintiff testified that the agreement was to give him a permanent position during his lifetime, as long as he should perform his duties to the satisfaction of the company, and that there was talk about the kind of employment, and Mr. Cooper, the train master, offered him the place of a gate tender, and that he refused that, and asked for a passenger run on the T. S. & M. branch. Cooper said he (the plaintiff) would have to see Mr. Atwater. He afterwards went to see Mr. Atwater, the general superintendent, at his office, and had a conversation with his clerk, who went into the next room, and told Mr. Atwater that Mr. Sax was there, and that Mr. Atwater said, "You tell Mr. Sax that we have made provision for him over on the T. S. & M.," and that he heard this conversation between the clerk and Atwater. Atwater then said that he should report for duty to Mr. Wykes, who was defendant's agent at Owosso, and he did so about two months later. Wykes gave him a release to sign, and he went to work as a passenger conductor. From this testimony it might be found that the minds of the parties met upon an employment as passenger conductor, which is what the declaration alleges. The only variance between the declaration and the proof relates to a recital of his former occupation, which is an unsubstantial matter, and therefore immaterial. *Lull v. Davis*, 1 Mich. 77; *Lothrop v. Southworth*, 5 Mich. 436; *Arnold v. Nye*, 23 Mich. 286; *Barton v. Gray*, 48 Mich. 164, 12 N. W. 30; *Bennett v. Beam*, 42 Mich. 346, 4 N. W. 8; *Tillman v. Fuller*, 13 Mich. 113; *Patterson v. Railroad Co.*, 56 Mich. 172, 22 N. W. 260. It is claimed that the talks with Cooper, and Main (the clerk), and Atwater were not admissible, because their authority to make such contract was not proved. If the matter rested upon the talk with the train master, we should sustain defendant's contention under the decision in *Maxson v. Railroad Co.*, 117 Mich. 218, 75 N. W. 459, but, taken in connection with the conversation of the general superintendent, and the presentation of the release, which had been demanded in the talk with Cooper, and the subsequent employment, and the failure of defendant to introduce evidence to the contrary, we think this conversation pertinent as tending to show knowledge and ratification of Cooper's offer, and completion of the contract by the general superintendent, whose authority in matters pertaining to the business of operating the road will, in the absence of proof to the contrary, be presumed to cover such a contract. *Elliott R. R.* § 297.

Contract of Em-  
ployment—Au-  
thority of  
General Super-  
intendent.

Counsel say that the court erred in refusing to direct a ver-

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dict for the defendant; (1) Because the contract was not in writing; (2) because there was no consideration for the promise; (3) because the defendant had a right to terminate it at will. The contract in question might have been performed within a year, and therefore the first point is not well taken. *Smalley v. Mitchell*, 110 Mich. 650, 68 N. W. 978. The execution of the release and a promise to re-employ were mutual promises, and the contract was, therefore, binding. The difference between this case and *Potter v. Railway Co.* (Mich.) 81 N. W. 80, is easily apparent. The case does not fall within the rule of *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157, because there is no claim in this case that he was discharged for the reason that the company was dissatisfied with him.

The court permitted the introduction of the mortality tables, as evidence bearing on the expectancy of life, in connection with the question of damages. It is urged that they ought not to be applied to a contract which the defendant might terminate at will. In answer to an inquiry made by a juror, the court told the jury that they should allow him damages, subject to his probable earnings, up to the expectancy of life, and that they should not take into account a possible re-employment by the defendant. Under the contract alleged and proved, the defendant had the right to terminate the employment whenever the plaintiff did not perform his duties to the entire satisfaction of the defendant. Under the rule as settled in this state the reasons for, or justice of, the defendant's satisfaction cannot be inquired into. See *Machine Co. v. Smith*, 50 Mich. 570, 15 N. W. 906; *Bucksport & B. R. Co. v. Inhabitants of Brewer*, 67 Me. 295; *Singerly v. Thayer*, 108 Pa. St. 291, 2 Atl. 230; *Seeley v. Welles*, 120 Pa. St. 75, 13 Atl. 736; *Printing-Press Co. v. Thorp* (C. C.) 36 Fed. 414, 1 L. R. A. 645; *Pierce v. Cooley*, 56 Mich. 552, 32 N. W. 310; *Machine Co. v. Cochran*, 64 Mich. 641, 31 N. W. 561; *Manufacturing Co. v. Ellis*, 68 Mich. 105, 35 N. W. 841; *Platt v. Broderick*, 70 Mich. 580, 38 N. W. 579; *Koehler v. Buhl*, 94 Mich. 500, 54 N. W. 157. It was admitted that the defendant company discontinued the service of the plaintiff when the service of a brakeman on the trains upon which he was at work was dispensed with, for that reason, through Mr. Cooper, the train master. It affirmatively appears, therefore, that he was not laid off by reason of dissatisfaction with his service, and a failure to employ him thereafter constituted a breach of the contract. It has been held in some cases that mortality tables were not admissible in negligence cases where the injury did not result in death or permanent disability. See *Mott v. Railway Co.* (Mich.) 79 N. W. 6; *Nelson v. Railroad Co.*, 38 Iowa, 568. In Texas it is held that the disability must be not only permanent, but total, to admit of such proof.

Same—Oral Contract—Validity.

Same—Consideration—Release of Liability for Personal Injuries.

Same—Same—Same—Breach of Contract—Damages—Evidence—Mortality Tables.

Same—Breach of Contract.

## Note

In *Railway Co. v. Douglass*, 69 Tex. 699, 7 S. W. 77, it was said that such evidence is admissible only when the earning capacity is entirely destroyed, and that, when the disability is only partial, such evidence would tend to confuse the jury. See, also, *Railway Co. v. Nelson*, 20 Tex. Civ. App. 541, 49 S. W. 710; *McDonald v. Railroad Co.*, 26 Iowa, 139. Upon the theory that plaintiff had contracted for employment for life, and that the defendant wrongfully refused further employment after the expiration of four months, the jury might take into consideration the probable period of his ability to perform service; and the probable duration of his life would, in such case, be an element in that problem. *Freeman v. Fogg*, 82 Mich. 408; *Parker v. Russell*, 133 Mass. 74; *Tippin v. Ward*, 5 Or. 450; *Schell v. Plumb*, 55 N. Y. 592; *Burritt v. Belfy*, 47 Conn. 323. The tables of mortality are admissible wherever the expectancy of life properly comes in controversy. They are not conclusive, however. *Nelson v. Railway Co.*, 104 Mich. 582, 62 N. W. 993; *Damm v. Damm*, 109 Mich. 619, 67 N. W. 984. In this case there were other elements to be considered than the duration of his life. The jury were instructed that they should find how much he was earning under his employment by defendant, and that whatever the evidence showed to be the value of other employment that he had been able to get should be deducted from such former earnings, and that would give them a starting point. From a colloquy with a juror they must have understood that the computation should be made upon his expectancy of life, subject to the deduction of what they should find he might earn up to the time of his death, and subject to a reduction to the present value. The jury was expressly told that they could not consider any liability of his re-employment. The theory of the defendant appears to have been that he was not discharged, but, whether this was so or not, or if the failure to employ for four months constituted a breach of the contract justifying a refusal to re-enter the defendant's employ (a question not discussed, and therefore not passed upon), it was proper for the jury to consider an offer of re-employment from the railroad, if there was a probability of any, as bearing upon the probable amount of his future ability to earn. His probable infirmity was also important in this connection. Again, the contract was not to employ for life. It was limited by the provision as to his giving satisfaction, and that also was an element that should have been considered by the jury. But the contract was, in effect, merely a contract to employ so long as his service should prove satisfactory. Under the cases cited the mortality tables should have been excluded. The judgment is reversed, and a new trial ordered. The other justices concurred.

## NOTE.

**Release from Claim for Damages by Injured Employee—Contract of Employment as Consideration.**—Where an employee, injured in the

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service of a railway company, gives the company a release from all claims for damages, in return for a promise of a steady job, at the same compensation received before the injury, the contract does not lack mutuality, and is enforceable. *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. Rep. 802.

Where a company sued by an employee for damages for personal injuries, pleads a release, he may avoid the same by showing that it was signed under the belief, induced by the fraudulent representations of the defendant's agents, that it was merely a receipt for wages. *Welsh v. Alabama & V. R. Co.*, 70 Miss. 20, 11 So. Rep. 723.

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W. W. CARGILL COMPANY, Plff. in Err.,

v.

STATE OF MINNESOTA *ex rel.* RAILROAD & WAREHOUSE  
COMMISSION.

(Argued and Submitted December 3, 4, 1900. Decided March 5, 1901.)

[21 Sup. Ct. Rep. 423.]

**Constitutional Law—License for Elevator or Warehouse—Storing Grain of Proprietor Only.**—The requirement of a license for a warehouse by Minn. Gen. Laws 1895, chap. 148, p. 313, regulating elevators and warehouses on railroad rights of way or lands used in connection with a railway at stations and sidings, is not forbidden by U. S. Const. 14th Amend., in case of a warehouse used exclusively for the storage of the grain of the owner, where the warehouse is used for the purpose of buying grain from the public, and is a sort of public market, and the warehouseman, a party in interest, acts as marketmaster, weighmaster, inspector, and grader of the grain.

**Construction of State Statutes.**—The construction of a state statute by the state court is to be accepted by the Federal court in determining whether the statute violates the Federal Constitution.

**Licensees—Duty to Comply with State Law Repugnant to Federal Constitution.**—The acceptance of a license under a state law does not impose upon the licensee an obligation to respect or to comply with any provisions of the statute, or any regulations prescribed by state authorities, that are repugnant to the Constitution of the United States.

**Same—License for Elevator or Warehouse.\***—The classification of elevators and warehouses on a railroad right of way or depot grounds, and other lands used in connection with the railway at stations and sidings other than at terminal points, as made by Minn. Gen. Laws 1895, chap. 148, p. 313, requiring a license for such elevators and ware-

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\*See generally, 7 Rapalje & Mack's Digest of Railway Law 240 *et seq.*; *Gulf, C. & S. F. R. Co. v. Ellis* (U. S.), 6 Am. & Eng. R. Cas., N. S., 752, and *note*, 770; Digest of Am. & Eng. R. Cas., N. S., 161 *et seq.*, and cases under the head, "Constitutional Law" in Am. & Eng. R. Cas., N. S., from vol. 9 to vol. 20, inclusive.

houses, does not deny to the proprietors the equal protection of the laws because a license is not required for elevators and warehouses differently situated.

**Same—Same—Interference with Interstate Commerce.**—The fact that grain stored in an elevator is to be shipped out of the state does not make a state statute requiring a license for conducting the business of such elevator in the state amount to a regulation of interstate commerce.

In Error to the Supreme Court of the State of Minnesota to review a decision reversing a judgment for defendant in an action by the state to enjoin the operation of an elevator and warehouse until a license is obtained. Affirmed.

See same case below, 77 Minn. 223, 79 N. W. 962.

The facts are stated in the opinion.

Mr. Ralph Whelan for plaintiff in error.

Mr. W. B. Douglass submitted the case for defendant in error, and Mr. W. J. Donahower was with him on the brief.

Mr. Justice Harlan delivered the opinion of the court:

The present action was brought in one of the courts of Minnesota, in the name of the state, against the W. W. Cargill Company, a Wisconsin corporation. The relief sought was a decree perpetually enjoining the defendant from operating a certain elevator and warehouse owned by it, situated on the right of way of the Chicago, Milwaukee, & St. Paul Railway Company, in the village of Lanesboro, Minnesota, until it should have obtained a license from the railroad & warehouse commission of that state.

The suit is based on a statute of Minnesota, approved April 16th, 1895, and entitled "An Act to Regulate the Receipt, Storage, and Shipment of Grain at Elevators and Warehouses on the Right of Way of Railroads, Depot Grounds, and Other Lands used in Connection with Such Line of Railway in the State of Minnesota, at Stations and Sidings, Other than at Terminal Points." Gen. Laws Minn. 1895, chap. 148, p. 313.

It seems to be necessary to a clear understanding of the case, and to the disposition of some of the questions presented for consideration, that the entire act be examined. It is therefore given in full in the margin.†

We here give only the first and second sections of the act:

"§ 1. All elevators and warehouses in which grain is received, stored, shipped or handled, and which are situated on

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† § 1. All elevators and warehouses in which grain is received, stored, shipped, or handled, and which are situated on the right of way of any railroad, depot grounds, or any lands acquired or reserved by any railroad company in this state to be used in connection with its line of railway at any station or siding in this state, other than at terminal points, are hereby declared to be public elevators, and shall be under

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the right of way of any railroad, depot grounds, or any lands acquired or reserved by any railroad company in this state to be used in connection with its line of railway at any station or siding in this state, other than at terminal points, are hereby declared to be public elevators, and shall be under the supervision and subject to the inspection of the railroad & warehouse commission of the state of Minnesota, and shall, for the purposes of this act, be known and designated as public country elevators or country warehouses. It shall be unlawful to receive, ship, store, or handle any grain in any such elevator or warehouse, unless the owner or owners thereof shall have procured a license therefor from the state railroad & warehouse commission, which license shall be issued for the fee of \$1 per year, and only upon written application under oath, specifying the location of such elevator or warehouse and the name of the person, firm, or corporation owning and operating such elevator or warehouse, and the names of all the members of the firm, or the names of all the officers of the corporation, owning and operating such elevator or warehouse, and all moneys received for such licenses shall be turned over

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the supervision and subject to the inspection of the railroad & warehouse commission of the state of Minnesota, and shall, for the purposes of this act be known and designated as public country elevators or country warehouses.

"It shall be unlawful to receive, ship, store, or handle any grain in any such elevator or warehouse, unless the owner or owners thereof shall have procured a license therefor from the state railroad & warehouse commission, which license shall be issued for the fee of \$1 per year, and only upon written application under oath, specifying the location of such elevator or warehouse and the name of the person, firm, or corporation owning and operating such elevator or warehouse, and the names of all the members of the firm, or the names of all the officers of the corporation, owning and operating such elevator or warehouse, and all moneys received for such licenses shall be turned over to the state grain inspection fund. Such license shall confer upon the licensee full authority to operate such warehouse or elevator in accordance with the laws of this state and the rules and regulations prescribed by said commission, and every person, company, or corporation receiving such license shall be held to have accepted the provisions of this act, and thereby to have agreed to comply with the same.

"If any elevator or warehouse is operated in violation or in disregard of the laws of this state its license shall, upon due proof of this fact, after proper hearing and notice to the licensee, be revoked by the said railroad & warehouse commission. Every such license shall expire on the 31st day of August of each year.

"§ 2. No person, firm, or corporation shall in any manner operate such public country elevator or country warehouse without having a license as specified in the preceding section; and any attempt to operate such elevator or warehouse without such license shall be deemed a misdemeanor, to be punished as hereinafter provided; and any attempt to

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to the state grain inspection fund. Such license shall confer upon the licensee full authority to operate such warehouse or elevator in accordance with the laws of this state and the rules and regulations prescribed by said commission, and every person, company, or corporation receiving such license shall be held to have accepted the provisions of this act, and thereby to have agreed to comply with the same. If any elevator or warehouse is operated in violation or in disregard of the laws of this state its license shall, upon due proof of this fact, after proper hearing and notice to the licensee, be revoked by the said railroad & warehouse commission. Every such license shall expire on the 31st day of August of each year.

"§ 2. No person, firm, or corporation shall in any manner operate such public country elevator or country warehouse without having a license as specified in the preceding section, and any attempt to operate such elevator or warehouse without such license shall be deemed a misdemeanor to be punished as hereinafter provided, and any attempt to operate such elevator or warehouse in violation of law and without having the license herein prescribed may, upon complaint of the

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operate such elevator or warehouse in violation of law and without having the license herein prescribed may upon complaint of the party aggrieved, and upon complaint of the railroad & warehouse commission, be enjoined and restrained by the district court for the county in which the elevator or warehouse in question is situate, by temporary and permanent injunction, conformably to the procedure in civil actions in the district court.

"§ 3. The railroad & warehouse commission shall before the 1st of September of each year, and as much oftener as they shall deem proper, make and promulgate all suitable and necessary rules and regulations for the government and control of public country elevators and public country warehouses, and the receipt, storage, handling, and shipment of grain therein and therefrom, and the rates of charges therefor, and the rates so fixed shall be deemed *prima facie* responsible and proper; and such rules and regulations shall be binding and have the force and effect of law; and a printed copy of such rules and regulations shall at all times be posted in a conspicuous place in each of said elevators and warehouses, for the free inspection of the public.

"§ 4. The party operating such country elevator or country warehouse shall keep a true and correct account in writing, in proper books, of all grain received, stored, and shipped at such elevator or warehouse, stating the weight, grade, and dockage for dirt or other cause on each lot of grain received in store for sale, storage, or shipment, and shall, upon the request of any person delivering grain for storage or shipment, receive the same, without discrimination, during reasonable and proper business hours, and shall, upon request, deliver to such person or his principal a warehouse receipt or receipts therefor in favor of such person or his order, dated the day the grain was received, and specifying upon its face the gross and net weight of such grain, the dockage for dirt or other cause, and the grade of such grain, conformable to the grade fixed



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party aggrieved, and upon complaint of the railroad & warehouse commission, be enjoined and restrained by the district court for the county in which the elevator or warehouse in question is situate, by temporary and permanent injunction, conformably to the procedure in civil actions in the district court."

The complaint alleged that the elevator was used by the defendant company in connection with the railway for the receiving and shipping of wheat and other grains transported over the lines of the railway company; was essential and necessary to the railway company in order promptly, safely, and properly to handle grains received by it for shipment; and constituted, in that respect, a necessary adjunct of the railroad.

The facts upon which the case was determined are set forth in a finding based upon the stipulation of the parties, and may be summarized as follows:

On April 16th, 1895, and for more than a year prior thereto, the defendant company was engaged in the business of buying, selling, and dealing in grain,—its principal office and place of

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by the state railroad & warehouse commission and in force at terminal points; and shall also state upon its face that the grain mentioned in such receipt or receipts has been received into store to be stored with grain of the same grade under such inspection, and that, upon the return of said receipt or receipts, and upon the payment or tender of payment of all lawful charges for receiving, storing, delivering, or otherwise handling said grain, which charges may have accrued up to the time of the return of said receipt or receipts, such grain is deliverable to the person named therein, or his order, either from the elevator or warehouse where it was received for storage; or if the owner so desires, in quantities not less than a carload on track on the same line of railway at any terminal point in this state which the owner may designate, where state inspection and weighing is in force, such grain to be subject to such official inspection and weight as may be determined upon its arrival or delivery at such terminal point, and the party delivering shall be liable for the delivery of the kind, grade, and net quantity called for by such certificate, less an allowance not to exceed 60 pounds per carload for shrinkage or loss in transit, if such shrinkage or loss occurs. On the return or presentation of such receipts by the lawful holder thereof, properly indorsed, at the elevator or warehouse where the grain represented therein is made deliverable and upon the payment or tender of payment of all lawful charges, as hereinbefore provided, the grain shall be immediately delivered to the holder of such receipt, and it shall not be subject to any further charges for storage after demand for such delivery shall have been made, and cars are furnished by the railway company which the party operating the elevator or warehouse shall have called for promptly upon request for shipment made by the holder of such receipt in the order of the date upon which such receipts are surrendered for shipment. The grain represented by such receipt shall be delivered within twenty-four hours after such demand shall have been

business being in the city of La Crosse, Wisconsin. It owned and operated large terminal and other grain elevators in that city, in Green Bay, and in other places in Wisconsin.

The village of Lanesboro contained about 1,100 inhabitants, and was situated in the county of Fillmore, Minnesota, upon the railway line of the Southern Minnesota division of the Chicago, Milwaukee, & St. Paul Railway Company, distant about 54 miles west from La Crosse, and having by the railway line referred to direct connection with that city.

Considerable quantities of grain had been annually raised in Fillmore county, and marketed, sold, and delivered into local grain elevators and warehouses in Lanesboro, and thence shipped in cars over the above-mentioned line of railway, which was the only means for such shipment.

The defendant company owned, occupied, and operated a grain warehouse situated on the right of way of the railway company and along its tracks in Lanesboro.

No machinery or mechanical appliances whatever had been used or were contained in its warehouse at Lanesboro; and all grain of every kind received into it during the period in ques-

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made and cars or vessels or other means for receiving the same from the elevator or warehouse shall have been furnished.

"If not delivered upon such demand within twenty-four hours after such car, vessel, or other means for receiving the same shall have been furnished, the warehouse in default shall be liable to the owner of such receipt for damages for such default, in the sum of 1 cent per bushel, and in addition thereto 1 cent per bushel for each and every day of such neglect or refusal to deliver; *provided*, no warehouseman shall be held to be in default in delivering if the property is delivered in the order demanded by holders of different receipts or terminal orders and as rapidly as due diligence, care, and prudence will justify.

"On the return of said receipts, if shipment or delivery of the grain at terminal points is requested by the owner thereof, the party receiving such grain shall deliver to said owner a certificate in evidence of his right to such shipment or delivery, stating upon its face the date and place of its issue, the name of the consignor and consignee and place of destination, and shall also specify upon the face of such certificate the kind of grain and the grade and net quantity exclusive of dockage, to which said owner is entitled by his original warehouse receipts and by official inspection and weighing at such designated terminal point.

"The grain represented by such certificate shall be subject only to such freight or transportation or other lawful charges which would accrue upon said grain from the date of the issue of said certificate to the date of actual delivery, within the meaning of this act, at such terminal point.

"All warehouse receipts issued for grain received, and all certificates, shall be consecutively numbered; and no two receipts or certificates bearing the same number shall be issued during the same year from the same warehouse, except when the same is lost or destroyed, in which case the new receipt or certificate shall bear the same date and

tion had been hauled to the warehouse in bags or farm wagons and there unloaded. The bags of grain were placed upon small hand trucks at the entrance of the building, and conveyed first to the weighing scale and thence to the grain bins of the warehouse into which the grain was poured from the bags.

The grain shipped from the warehouse was "spouted" by force of gravity into box cars standing on the railway tracks, and thence carried by the railroad company over its line for the defendant company to such points as the latter might direct.

Each parcel or lot of grain received into or deposited or handled in or shipped from the warehouse had been purchased by the defendant, and was its sole and absolute property.

The defendant company during the period mentioned never received into, or shipped from, or handled or deposited or in any way stored in the warehouse any grain in which any other person or persons had any property, title, right, or interest; nor issued or offered to issue any warehouse receipt or storage ticket for grain received there; nor carried on or offered or

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number as the original, and shall be plainly marked on its face 'Duplicate.' Warehouse receipts or certificates shall not be issued except upon grain which has actually been delivered in said country warehouse. Warehouse receipts shall not be issued for a greater quantity of grain than was contained in the lot or parcel stated to have been received. No receipt or certificate shall contain language in anywise limiting or modifying the liability of the party issuing the same as imposed by the laws of this state, and any such language, if inserted, shall be null and void.

"A failure to specify in such warehouse receipts or certificates the true and correct grade and net weight, exclusive of dockage, of any lot of grain to which the owner of such grain may be entitled, shall be deemed a misdemeanor on the part of the person issuing the same, for which, on conviction, he may be punished as hereinafter provided.

"§ 5. In case there is a disagreement between the person in the immediate charge of and receiving the grain at such country elevator or warehouse, and the person delivering the grain to such elevator or warehouse for storage or shipment, at the time of such delivery, as to the proper grade or proper dockage for dirt or otherwise, on any lot of grain delivered, an average sample of at least three quarts of the grain in dispute may be taken by one or both parties and forwarded in a suitable sack, properly tied and sealed, express charges prepaid, to the chief inspector of grain at St. Paul, which shall be accompanied by the request, in writing, of either or both of the parties aforesaid, that the said chief inspector shall examine the same and report what grade or dockage or both the said grain is, in his opinion, entitled to and would receive, if shipped to the terminal points and subjected to official inspection.

"It shall be the duty of said chief inspector, as soon as practicable, to examine and inspect such sample of grain, and adjudge the proper grade

attempted to carry on in the warehouse the business of receiving, handling, storing, or shipping grain of or for any other person or persons. But the warehouse was used, occupied, and operated by the defendant solely for the purpose of receiving, handling, and shipping its own grain in its private capacity as grain owner and merchant.

During all the time the warehouse was owned, occupied, and operated by the defendant, all grain of every kind and description received into, or deposited or handled in, or shipped from, the warehouse was purchased by it for the express purpose of acquiring, shipping, and transporting it as its property solely to its terminal elevators in the cities of La Crosse and Green Bay, or to Milwaukee, Wisconsin, or to Chicago, Illinois, and thence to other points in states east of Lake Michigan and upon the Atlantic seaboard.

All the grain so received into, or deposited or handled in, the warehouse had been actually shipped as its property from the warehouse in carload lots over the railway line, and directly and continuously transported by the railway company beyond Minnesota to its terminal elevators, cities, or points

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or dockage, or both, to which said sample is, in his judgment, entitled, and which grain of like quality and character would receive if shipped to the terminal points and subjected to official inspection.

"As soon as the chief inspector has examined, inspected, and adjudged the grade and dockage as aforesaid, he shall at once make out in writing and in triplicate a statement of his judgment and finding in respect to the case under consideration, and shall transmit by mail to each of the parties in said disagreement a copy of the said statement of his judgment and finding, preserving the original together with the sample on file in his office.

"The judgment and finding of the said chief inspector shall be deemed conclusive as to the grade or dockage, or both, of said sample, submitted for his consideration, as herein provided, as well as conclusive evidence of the grade or dockage, or both, that grain of the same quality and character would receive if shipped to the terminal points and subjected to official inspection.

"§ 6. Whenever complaint is made, in writing, to the railroad & warehouse commission by any person aggrieved, that the party operating any country elevator or country warehouse under this act fails to give just and fair weights and grades, or is guilty of making unreasonable dockage for dirt or other cause, or fails in any manner to operate such elevator or warehouse fairly, justly, and properly, or is guilty of any discrimination, then it shall be the duty of the railroad & warehouse commission to inquire into and investigate said complaint and the charge therein contained; and to this end and for this purpose the commission shall have full authority to inspect and examine all the books, records, and papers pertaining to the business of such elevator or warehouse, and all the scales, machinery, and fixtures and appliances used therein.

"In case the said commission find the complaint and charge therein

in Wisconsin, Illinois, and states other than Minnesota, and to no other points or places.

As fast as received into the warehouse from wagons all the grain was "spouted" into the boxcars of the railway company for shipment, or was loaded into such cars severally containing different kinds of grades of grain separated from each other within the car by partitions, as sufficient grain for such a carload was accumulated in the warehouse, or was loaded out and so shipped as a full carload of grain of any one kind and grade was received into the warehouse; and no grain received or deposited in, or shipped from, the warehouse was handled or shipped in any manner other or different from one of the modes indicated, or kept in the warehouse longer or for any other purpose than as stated.

No grain received into, or deposited or handled in, or shipped from, the warehouse had been bargained or sold or delivered to any person or firm or corporation doing business or resident in, or a citizen of, Minnesota, or shipped or transported to, or delivered at, any city, village, town, point, or place within the boundaries of that state.

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contained, or any part thereof, true, they shall adjudge the same in writing, and shall at once serve a copy of such decision, with a notice to desist and abstain from the error and malpractice found, upon the party offending and against whom the complaint was made, and to afford prompt redress to the party injured, and if such party does not desist and abstain, and does not give the proper redress and relief to the party injured, it shall be the duty of the said commission to make a special report of the facts found and ascertained upon the investigation of said complaint and the charge therein contained, which report shall also include a copy of the decision by said commission made therein to the attorney of the county where such elevator or warehouse is located, who shall institute and carry on in the name of the complainant such actions, civil or otherwise, as may be necessary and appropriate to redress the wrongs complained of and to prevent their recurrence in the future.

"§ 7. Any person, firm, or corporation operating any country warehouse or country elevator under this act shall, at any and all times when requested by the railroad & warehouse commission, render and furnish in writing under oath to the said commission a report and itemized statement of all grain received and stored in, or delivered or shipped from, such elevator or warehouse during the year then last past. Such statement shall specify the kind, grade, gross and net weight of all grain received or stored, and all grain delivered or shipped, and shall particularly specify and account for all so-called overages that may have occurred during the year. Such statement and report shall be made upon blanks and forms furnished and prescribed by the railroad & warehouse commission.

"The commission shall cause every warehouse and the business thereof, and the mode of conducting the same, to be inspected at such times as the commission may order, by one or more members of the commis-

During the time mentioned all grain of every kind and description received into or deposited or handled in, or shipped from, the warehouse was grown in Minnesota, and was sold and delivered to the defendant by, and received into the warehouse from, citizens and residents of, or other persons doing business in, Minnesota, the weights, grades, dockage, and inspection of all such grain having been fixed by mutual agreement between such persons and the company without controversy in respect thereto, and in no other manner and by no other persons; and no weighing, grading, docking, or inspection of, or supervisi on or regulation of, any grain was performed or attempted or offered to be done or performed in or about the warehouse on the receipt or shipment of grain or at any other place or time by any person delegated or furnished by, or acting under the authority of, the state of Minnesota, or of any law thereof or of the railroad & warehouse commission of Minnesota, or any rule, regulation, officer, agent, or representative thereof, or by any person in any capacity whatsoever.

The defendant company never applied to the railroad & warehouse commission for license to receive, ship, store, or

sion, or by some member of the grain-inspection department, especially assigned for that purpose, who shall report in writing to the commission the result of such examination; and the property, books, records, accounts, papers, and proceedings, so far as they relate to their condition, operation, and management, shall, at all times during business hours, be subject to the examination and inspection of such commission.

"§ 8. It shall be unlawful for any person, firm, or corporation, who shall operate any country grain elevator or country warehouse, under this act, to enter into any contract, agreement, understanding, or combination with any other person, firm, or corporation, who shall operate any other country grain elevator or country grain warehouse under this act, for pooling of the earnings or business of other different and competing grain elevators or warehouses so as to divide between them the aggregate or net proceeds of the earnings or business of such grain elevators or warehouses, or any portion thereof; and in case of any agreement for the pooling of the earnings or business aforesaid, each day of its continuance shall be deemed a separate offence.

"§ 9. Any person, firm, or corporation who is guilty of any of the misdemeanors specified in this act, or who is guilty of violating any of the provisions of this act, shall, on conviction, be punished by a fine of not less than \$50 and not more than \$500, and in case a natural person is so convicted, he may be imprisoned until the fine is paid or until discharged by due course of law; and in case a corporation is so convicted, the fine may be collected by execution, as judgments are collected in civil actions, or the property of the corporation may be sequestered and charged with the same in appropriate legal proceedings.

"§ 10. All laws and parts of laws inconsistent with this act are hereby repealed.

"§ 11. This act shall take effect and be in force from and after the date of its passage."

handle any grain in its elevator, and never procured a license therefor from the commission.

The parties stipulated and agreed that the plaintiff would make no claim of right to maintain the action except under and by virtue of the law in question.

Such being the case made by the finding of facts, the relief asked was denied, the court of original jurisdiction holding that the statute was not a lawful exercise of the police power, and was repugnant as well to the Constitution of Minnesota as to § 1 of the 14th Amendment in so far as it declared warehouses and elevators in which only the grain of the owner was received, stored, shipped, or handled to be public elevators subject to the supervision of the railroad & warehouse commission.

The case was carried to the supreme court of Minnesota, and the judgment was reversed. That court, speaking by Judge Cauty, said: "If the business carried on at this warehouse consisted of nothing more than storing defendant's own grain, we would concede that such business would warrant but little interference or regulation of it by the state. But that business does consist of something more. It was conceded on the argument, and is fairly to be inferred from the findings and stipulation of facts, that the grain is purchased, weighed, graded, and delivered at the warehouse, and that defendant, with its own scales and appliances, weighs and grades the grain. Under these circumstances the warehouse is a sort of public market place, where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as marketmaster, weighmaster, inspector, and grader of the grain. Surely such a business is of a public character, and is sufficiently affected with a public interest to warrant a very considerable amount of regulation of it by the state. The business carried on by defendant at its warehouse is similar to that carried on at a large number of other warehouses and elevators in this state. The grain crops of this state constitute by far the most important part of its commerce and its greatest resource. It is important to see that correct weights are had; that uniform grades are given; that the proper amount of dockage and no more is taken; that no dishonest practices are allowed and no undue advantage is permitted to be taken. Said chapter 148 requires the person operating such an elevator or warehouse to procure a license to be issued by the state railroad & warehouse commission, for which a fee of \$1 per year must be paid. The act also provides that such license may be revoked by the commission if the warehouse or elevator is operated in violation or in disregard of the laws of this state. Section 2 provides that any person attempting to run such an elevator or warehouse without a license may be enjoined in a suit for that purpose. Section 3 provides that the commission may make suitable and necessary rules and regulations for the

government of public country warehouses and elevators. Then follow other provisions. There are undoubtedly many provisions in the act which apply only to warehouses and elevators in which grain is stored for others or for the public, which provisions do not and cannot apply to such warehouses as the one here in question. There are, perhaps, provisions in the act which it would be unconstitutional to apply to such a warehouse as this. But these matters need not be considered at this time. The provision requiring a license is not one of these. This disposes of the only question argued which it is necessary to consider." State ex rel. Railroad & Warehouse Commission v. W. W. Cargill Co., 77 Minn. 223, 79 N. E. 962.

Judge Mitchell delivered a separate opinion, in which he said that in view of the fact, among others, that grain was the principal agricultural product of the state, that in its purchase and sale there was great liability to abuse in the matter of weights and grades, and that these were usually determined by the purchaser with his own instrumentalities, he agreed with the court that, although the owner of a warehouse use it exclusively for the storage of his own grain, yet if he used it for the purpose of buying grain from the public, thus rendering it, in effect, a public market, his business was a proper subject of police regulation by the state to the extent of providing such rules and regulations as were reasonably necessary to secure to the public just and correct weights and grades. He was also of opinion that the requirement of a license might be a reasonable regulation in such cases as a means of enabling state officials to ascertain who were engaged in the business. But he was of opinion that the provisions of the statute constituted a system of rules and regulations the different parts of which were so connected with, and dependent upon, each other that it was in many instances impossible to separate them; that many of them were wholly inapplicable to warehouses not used for the storage of grain for others. Some of them were, in his judgment, clearly not within the police powers of the state as applied to warehouses not used for the storage of grain for others. Considering the case only upon the lines followed by the majority, Judge Mitchell was of opinion that, in view of the connection and interdependence of its various provisions, the whole act should be held invalid as to warehouses not used for the storage of grain for others.

We have seen that the only relief asked by the state was that the defendant company be restrained and enjoined from the further operation of its elevator in receiving, storing, or handling of wheat or other grains until it was duly licensed therefor by the railroad & warehouse commission. It was, in effect, adjudged that a license from that commission was a condition precedent to the right of the defendant company to use or operate its elevator or warehouse in the manner and for the purposes indicated; also, that although the statute might contain many provisions not applicable to warehouses like the one



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owned by the defendant, and other provisions that, perhaps, were unconstitutional when applied to business like that in which the company was engaged, the provision requiring a license could stand and be enforced.

The questions just stated are questions of local law, and in determining whether the statute violates any right secured by the Federal Constitution we must, in the particulars named,

accept the interpretation put upon it by the state court. In *Tullis v. Lake Erie & W. R. Co.*, 175

U. S. 348, 353, 44 L. Ed. 192, 195, 20 Sup. Ct. Rep. 136, 138, the question was as to the constitutionality of a statute of Indiana relating to railroads and other corporations, except municipal corporations. The supreme court of that state held that the statute was capable of severance, and that its provisions as to railroads were not so connected in substance with the provisions relating to other corporations that their validity could not be separately determined. This court followed that view, declaring it to be an elementary rule that it should adopt "the interpretation of a statute of a state affixed to it by the court of last resort thereof." See also *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 414, 41 L. Ed. 489, 494, 17 Sup. Ct. Rep. 130; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 456, 33 L. Ed. 970, 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 408, 43 L. Ed. 746, 748, 19 Sup. Ct. Rep. 419.

Pursuant to this rule, and without expressing any opinion on the question, we assume that the provision requiring a license from any person, firm, or corporation proposing to engage in the business described in the 1st section embraces the defendant company; that such provision may stand alone; and that its validity may be determined without reference to other provisions of the statute.

Thus considering the statute, we are of opinion that the mere requirement of a license from a person, firm, or corporation engaged in such business as that conducted by the defend-

ant is not forbidden by the 14th Amendment of the Constitution of the United States. "The liberty mentioned in that Amendment," we have said, "means not only the right of a citizen to be free from the mere physical restraint of his

person, as by incarceration, but the term is deemed to embrace the right of the citizens to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. Ed. 832, 836, 17 Sup. Ct. Rep. 427, 431. But to require the defendant company to obtain a

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Only.

license is not forbidden by the Amendment. The authority to make such a requirement is to be referred to the general power of the state to adopt such regulations as are appropriate to protect the people in the enjoyment of their relative rights and privileges, and to guard them against fraud and imposition. *Dent v. West Virginia*, 129 U. S. 114, 122, 32 L. Ed. 623, 626, 9 Sup. Ct. Rep. 231; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. Ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 162. The state court well said that the defendant's warehouse could be fairly regarded as "a sort of public market where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as marketmaster, weighmaster, inspector, and grader of the grain." We cannot question the power of the state, so far as the Constitution of the United States is concerned, to require a license for the privilege of carrying on business of that character within its limits,—such a license not being required for the purpose of forbidding a business lawful or harmless in itself, but only for purposes of regulation.

The defendant, however, insists that some of the provisions of the statute are in violation of the Constitution of the United States, and if it obtained the required license, it would be held to have accepted all of its provisions, and (in the same words of the statute) "thereby to have agreed to comply with the same." § 1. The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the state railroad & warehouse commission that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the state and the valid rules and regulations prescribed by the commission. If the commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings.

But the further contention of the defendant company is that the requirement of a license from the owners of elevators and warehouses situated on the right of way of a railroad at one of its stations or sidings other than at terminal points, without requiring a license in respect of elevators and warehouses differently situated, is a denial of the equal protection of the laws, and makes the statute obnoxious to the principle that "no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon

Licenses—Duty  
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State Law  
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others in the same calling and condition." *Barbier v. Conolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 925, 5 Sup. Ct. Rep. 357, 359; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. Ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

Assuming that the defendant is entitled, upon this record, to invoke the benefit of the clause of the 14th Amendment forbidding a state from denying to any person within its jurisdiction the equal protection of the laws, we adjudge that as the statute applies to all of the class defined in its 1st section, it is not invalid by reason of its nonapplication to those who own or operate elevators not situated on the right of way of a railroad. The railroad, as this court has often said, is a public highway established primarily for the convenience of the public, and—subject always to any right acquired by the railroad company under an inviolable contract with the state—the use of such a highway may be so regulated as to promote the public convenience, provided such a regulation be not arbitrary in its character, and does not materially interfere with the enjoyment by the railroad company of its property. The right of way is so closely connected with the operations of the railroad company that its use may be so regulated by the state as to promote the ends for which the corporation was created, and thus subserve the interests of the general public without interfering unreasonably with the company's management of its property. If in the judgment of the state it was necessary for the public interests, or beneficial to the public, that elevators and warehouses of the kinds described should be operated only under a license and under such regulations as may be rightfully prescribed, it would be going very far to hold that such a classification was so unreasonable as to justify us in adjudging that the requirement of a license was void as denying the equal protection of the laws. No such judgment could be properly rendered unless the classification was merely arbitrary or was devoid of those elements that are inherent in the distinction implied in classification. We cannot perceive that the requirement of a license is not based upon some reasonable ground,—some difference that bears a proper relation to the classification made by the statute. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 165, 41 L. Ed. 666, 671, 17 Sup. Ct. Rep. 255. It is worthy of observation in this connection that it was neither alleged nor proved that there were in the state any elevators or warehouses that were not situated on the right of way of a railroad company.

It is also contended that the requirement of a license from the defendant company is inconsistent with the power of Congress to regulate commerce among the states. This view cannot be accepted. The statute puts no obstacle in the way of the purchase by the defendant company of grain in the state or the shipment out of the state of such grain as it purchased. The license has reference only to the business of the

Same—Same—  
Interference  
with Interstate  
Commerce.

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defendant at its elevator and warehouse. The statute only requires a license in respect of business conducted at an established warehouse in the state between the defendant and the sellers of grain. We do not perceive that in so doing the state has intrenched upon the domain of Federal authority, or regulated or sought to regulate interstate commerce. In no real or substantial sense is such commerce obstructed by the requirement of a license.

Without expressing any opinion as to the extent to which the railroad & warehouse commission may supervise the business of a person, firm, or corporation receiving a license under the statute, and restricting our decision to the only question necessary to be decided, we adjudge that the statute of Minnesota, so far as it requires a license for conducting such business as that in which the defendant is engaged, is not repugnant to the Constitution of the United States.

The judgment is affirmed.

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MOUTON

v.

LOUISVILLE & N. R. Co.

(*Supreme Court of Alabama, Dec. 20, 1900.*)

[29 So. Rep. 602.]

**Demurrer Waived.**—Where a demurrer was interposed to a special plea, and no judgment appeared thereon in the record, the demurrer will be deemed to have been waived.

**Carriers of Freight—Failure to Deliver Goods—Bill of Lading—Failure of Shipper to Sign.**—In an action by the consignee against a carrier for failure to deliver goods, the bill of lading, which was made out by the consignors on their own special blank, but was not signed by the consignors or consignee, and only by the carrier's agent, was properly admitted in evidence, as the consignors, by shipping the goods under the bill, accepted the same, and were bound thereby, though they had not signed it.

**Same—Same—Limiting Liability—Evidence—Bill of Lading—Consignor as Consignee's Agent.**—In an action against a carrier by the consignee for failure to deliver goods, the bill of lading, which contained a stipulation exempting the carrier from liability for loss or damage to the goods by fire, and which was made out by the consignors on one of their own special blanks, was properly received in evidence, as the consignors were necessarily the agents of the consignee for the shipment, and could bind the consignee for the bill of lading without express authority.

**Same—Same—Evidence—Bills of Lading—Technical Words Explained by Railroad Agent.**—In an action against a carrier for failure to deliver goods, where the bill of lading contained the words, "K. D. & released," in the description of the property, an objection to allowing the railroad

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agent to explain their terms, on the ground that it was the duty of the court to define and construe words, was properly overruled, as such rule does not apply to the construction of technical words.

**Same—Limiting Liability—Consideration—Reduced Rates.\*—**Reduced rates given for the transportation of freight is a sufficient consideration to support a special contract exempting the carrier from liability for loss or damage by fire not caused by the carrier's negligence.

**Evidence of Approval of Rates by Interstate Commerce Commission.**—Where, in an action against a carrier for failure to deliver goods, it was proved that special rates of transportation had been given as the consideration for an exemption from liability, it was error to allow a witness to testify that the rates given were approved by the interstate commerce commission, as such fact should have been established by the best evidence,—the rulings of the commission.

**Loss of Goods—Absence of Negligence—Burden of Proof.**—In an action against a carrier for failure to deliver goods, where the delivery of the goods to the carrier, and the failure of the carrier to deliver them at their destination, is shown, the burden of proof is on the carrier that the loss occurred without its fault.

**Same—Negligence in Failing to Extinguish Fire—Question for Jury.**—Plaintiff was the consignee of a car of wagons, which was destroyed by fire while in transit over the defendant road. The fire in the car was discovered a little after midnight, when the train was between stations, about four miles from B., a station with a large water tank, and which the train had just left. The wagons were properly packed in the car without any inflammable material, and the car door sealed, with the usual car seals. On discovering smoke issuing from the car, the train was stopped, but no flame was discovered until the conductor opened the door of the car. A small hole was cut through the roof of the car, through which a few pails of water were poured, but, the hole being so small, some of the water was lost. On the conductor's orders, the train was cut, and the burning car taken four miles, to W., a station where there was no water tank or appliances for extinguishing fires. *Held*, in an action for failure to deliver the wagons, that the evidence, though not conflicting, was such that different minds might reasonably draw different inferences therefrom in regard to defendant's diligence in attempting to extinguish the same, and hence it was error for the court to give a general charge in favor of the defendant.

Appeal from circuit court, Lauderdale county; E. B. Almon, Judge.

Action by A. E. Mouton against the Louisville & Nashville Railroad Company. From a judgment in favor of the defendant, plaintiff appeals. Reversed.

This was an action brought by the appellant, A. E. Mouton, the successor of the firm of Moss & Mouton, against the Louisville & Nashville Railroad Company, for its failure as a common carrier to transport and deliver certain wagons delivered to it at Florence, Ala., to be carried to Lafayette, La.

Case Stated.

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\*See notes at end of case.

The defendant pleaded the general issue and a special plea, the substance of which is set forth in the opinion. To this plea the defendant demurred upon several grounds. The judgment entry upon this demurrer was as follows: "Comes the parties by their attorneys, and the demurrer to the special plea filed in this cause on the 7th day of March, 1899, is by the court overruled." The other facts of the case, necessary to an understanding of the decision on the present appeal, are sufficiently stated in the opinion.

Upon the introduction of all the evidence, the court, at the request of the defendant, gave the general affirmative charge in its behalf, to the giving of which charge the plaintiff duly excepted.

There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

John T. Ashcraft and Emmet O'Neil, for appellant.

Thos G. & Chas. P. Jones and Alex C. Birch, for appellee.

Haralson, J. 1. The complaint is in Code form against defendant, for failure as a common carrier to transport certain described wagons, delivered to it at Florence, Ala., to be transported to Lafayette, La.

The defendant pleaded the general issue, and a special plea, that the property was delivered to it as a common carrier at Florence, Ala., under a contract expressed in the bill of lading, whereby it was stipulated and agreed that defendant should not be liable "for any loss thereof or damage thereto by causes beyond its control or by floods or fire," alleging, "that while said property was in its possession and during the transportation, said property was destroyed by fire, and that said fire and said loss were not the result of negligence on the part of defendant."

There was a demurrer to this plea on several grounds, but no judgment thereon appears, and it will be treated as waived.

Demurrer  
Waived.

The plaintiff filed replications to this plea, "(1) That there was no consideration moving from defendant to the plaintiff for the special limitations limiting liability, (2) there was no consideration moving from the defendant to the consignor of the goods for the special limitations limiting liability, and (3) the bill of lading was not signed by the shipper or his agent."

The defendant moved to strike replications 1 and 3, and the judgment entry shows, in proper form of judgment, that the motion was granted; but the motion, ruling of the court thereon and exception to the ruling, do not appear in the bill of exceptions.

The case was tried, therefore, on the general issue; on issue joined on the defendant's special plea, and on issue joined on the replications to defendant's said special plea. Stated in

condensed form, the issues were, whether or not there was any binding special contract, such as is set up in said special plea; and if so, whether, while the property was in the possession of defendant and during its transportation, it was destroyed by fire, by the negligence of defendant; and, whether there was any consideration moving from defendant to the consignor of the goods for the special stipulation limiting defendant's liability for the loss of the goods by fire during transportation.

2. It was admitted, that on the 20th September, 1897, the Florence Wagon Works, the manufacturers of the wagons and the consignors, delivered to defendant at Florence one car of wagons, directed to Moss & Mouton, the consignees, at Lafayette, La., and that said car and goods were never delivered. The value of the wagons was also admitted, and that the plaintiff, A. E. Mouton, was the successor of said Moss & Mouton and the proper party to bring the suit.

It was shown that the car was properly packed without waste or shavings, and that the wagons could not be very easily removed from the car by an inexperienced person, and could be much more easily removed through one door of the car, than through the other. They were taken to pieces for shipment.

This proof, without more, entitled the plaintiff to a verdict.

3. The carrier is liable at common law for the safety of the goods intrusted to his care for transportation, for injuries or losses which cannot be directly traced "to the act of God, or of the public enemy, or of the party complaining." To this extent, his liability is that of an insurer. But it is well settled, that the carrier "may, by special contract, limit or qualify his liability as an insurer, or his common-law liability, \* \* \* not only touching the risks or accidents for which he is answerable, but also as to the amount of damages for which he will be liable in the event of loss or injury, when the purpose appears to secure a reasonable and just proportion between his liability and his compensation." *Railroad Co. v. Little*, 71 Ala. 611. When relying on this exemption from liability for loss of goods by fire, delivered to it for carriage, the carrier must show that the goods were destroyed by fire, and that such loss was without fault on its part. *Railroad Co. v. Touart*, 97 Ala. 514, 11 South. 756. The special plea of the defendant in apt terms sets up the exemption of defendant from his liability as an insurer in the transportation of the freight, and averred that the loss of the goods was not the result of negligence on its part.

4. The defendant introduced a bill of lading it signed for the freight, which contained the clause: "It is mutually agreed, in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination, \* \* \* that every service to be performed hereunder shall be subject to all the conditions on the back of this receipt, which are hereby agreed to by the shipper and by him accepted for himself and

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his assigns as just and reasonable." (Here follows a description of the freight, with the names of the consignees, "Moss & Mouton, Lafayette, La. Rate, 43c.," and was signed "C. N. Jones, Agent.") On the back of this receipt, under the head of "Conditions," appears among other stipulations, the following: "(1) No carrier or party in possession of all or any of the property herein described, shall be liable for any loss thereon or damage thereto, by causes beyond its control, or by floods or fire, or by quarantine," etc.

The defendant proved that the wagon works had, for its own convenience, its own bills of lading in blank, and made out the one offered in evidence in triplicate and sent them with the car when loaded to the agent to be signed; that the agent signed the three, one was kept by the railroad company, and two were returned to the shippers, one of which they retained, and the other they forwarded to the consignees. The plaintiff objected to the introduction of this receipt, or bill of lading, because it was not signed by the Florence Wagon Works, nor by the plaintiff; and because it was not shown that the plaintiff authorized the Florence Wagon Works to accept a shipping receipt or bill of lading, containing exemptions from liability by fire. These objections were without merit. Made out and accepted as a shipping

Carriers of  
Freight—Failure  
to Deliver Goods  
—Bill of Lading  
—Failure of  
Shipper to Sign.

Same—Same—  
Limiting Liability—  
Evidence—  
Bill of Lading—  
Consignor as  
Consignee's  
Agent.

receipt by them and acted on by them as such, it was not necessary to be binding on them for them to sign the same, nor to notify the carrier that they had accepted it. *Extract Co. v. Ryan*, 104 Ala. 274, 15 South. 807; *Railroad Co. v. Fulgham*, 91 Ala. 555, 8 South. 803; 1 Pars. Cont. 492, note 1. They, and not defendant, were necessarily the agents of the consignees for the shipment of the goods, and defendant was bound to ship by their instructions, as it did. What the agreement between them and the consignees was, as to the sale and purchase of the goods, and how they were to be shipped, defendant had no means of knowing, and was not interested or bound to ascertain. A bill of lading given by a carrier on the delivery of the goods to him for transportation, limiting its extraordinary liability, is regarded as a special contract, if accepted by the shipper or consignor with knowledge of its contents, or, if reasonably prudent with opportunity of acquiring such knowledge. *Railroad Co. v. Little*, 71 Ala. 611; *Steele v. Townsend*, 37 Ala. 247.

5. The bill of lading, as made out by the shippers under the head of "Articles," specifies the articles shipped, as "1 car farm wagons. K. D. & released." When the railroad agent, Jones, was being examined, he was asked by defendant what "K. D. & released" appearing on the bill meant. The plaintiff objected on the ground that "it is the duty of the court to define and construe the meaning of words." The objec-

Same—Same—  
Evidence—Bills  
of Lading—Tech-  
nical Words  
Explained by  
Railroad Agent.



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tion was properly overruled, the principle invoked having no application to such signs and technical words as are here employed, and which are not in general use. It was fully explained by Jones, defendant's agent and witness, and by J. C. Little, the plaintiff's witness, who made out the bills of lading, shipped the goods and sent the duplicate copy to the consignees, that "released" meant that the carrier was released by the shipper from liability for loss not occasioned by the carrier's negligence, and the shipper gets a better rate of freight when it is released; that "K. D." meant knocked down, that is, that the wagons were not set up in running order, but taken to pieces, when packed in the car. It was further shown, without conflict, that the released freight charges to Lafayette were 43 cents per hundred pounds,—22 cents from Florence to New Orleans, and 21 cents from the latter point to Lafayette; and that, if the freight had not been reduced, 30 per cent. higher rate than 43 cents per hundred, would have been charged. It is well settled, that reduced rates given for the transportation of freight is a sufficient consideration to support the special contract of exemption in case of loss by fire without the carrier's negligence. *Railway Co. v. Harwell*, 97 Ala. 341, 11 South. 781; *Railroad Co. v. Oden*, 80 Ala. 38; *York Co. v. Illinois Cent. R. Co.*, 3 Wall. 107, 18 L. Ed. 170; *Hutch. Carr.* § 278; *Code*, § 1800.

Same—Limiting  
Liability—Con-  
sideration—Re-  
duced Rates.

In this connection it may be stated, that it was not proper for the court to allow this witness to state, that the classification and rates charged were approved by the interstate commerce commission. If it was important to show the rulings and orders of that commission, higher and better evidence—the rulings themselves—was required, and they could not be shown by parol.

Evidence of  
Approval of  
Rates by Inter-  
state Commerce  
Commission.

6. From what has gone before, the case is disembarrassed of the main questions involved except the one, whether or not the defendant used proper care to extinguish the fire, after its discovery. The contention on the part of defendant is, that the evidence is without conflict, and the general charge was properly given in favor of defendant on it, as well as on all other questions tried. This position is seriously controverted on the other side, on the law and facts.

The rule applying in such cases has been aptly stated to be, that "in all cases not free from doubt, either where the evidence is conflicting, or where it is not, and different minds may draw different inferences or conclusions on the subject, the question of negligence is one of fact for the determination of the jury. It becomes a question of law to be determined by the court, only when the case is so free from doubt as that the inference of negligence to be drawn from facts is clear and certain." *Railroad Co. v. Bayliss*, 74 Ala. 151, 161; *City Council v. Wright*, 72 Ala. 411; *Wilson v. Railroad Co.*,

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85 Ala. 269, 4 South. 701; 16 Am. &amp; Eng. Enc. Law, 465-468, and notes.

**Loss of Goods—  
Absence of Neg-  
ligence—Burden  
of Proof.**

The burden of proving that the loss occurred without the fault of defendant, as we have seen, was on it. *Railroad Co. v. Touart*, 97 Ala. 514, 11 South. 756; *Railroad Co. v. Little*, 71 Ala. 615.

7. It does not appear how the fire originated. From aught appearing, it would seem due care had been exercised on the

**Same—Negli-  
gence in Failing  
to Extinguish  
Fire—Question  
for Jury.**

part of the shipper and the carrier to prevent the fire. The freight was, as shown, well packed, without the presence of any inflammable material, in a close well-constructed freight car, with no

cracks or apertures through which sparks could enter, until after the fire originated. The doors were well closed and sealed. It was shown by competent proof that the train of cars was well equipped, and had a crew consisting of the conductor, engineer, fireman, and two brakemen, one of them being a flagman. The car consumed was the eighth one from the engine, in a train of 18 cars. The train left Decatur on its way south, at 9 o'clock, the 4th of October, 1897. It stopped at Blount Springs, where there was a large tank, just on the roadside. The brakemen and the conductor inspected the train at this point, and discovered no fire in it. It was five miles from Blount to Reeds, the next station, and when the train was about a mile south of Reeds, the conductor as he testified, being in the cupola of his caboose, looking over the train, saw a blaze break out in the northeast corner of said car, and the train was stopped as soon as it could be done, at 12:15 o'clock a. m.; that he went over the top of the cars, and descending near the one in which the fire was, discovered fire coming from the inside, between the tongues and grooves of the planks out of which the car was constructed, the tongues having burned out; that he prized the door open, but could not get the wagons out, and chopped a hole through the roof, and as he stated, had about a dozen buckets of water brought and poured in; the fire was in the corner of the car near the top, and it was the wagons on fire; that they could do nothing with it,—when they poured water on it, the fire would go down a little, but before they could get back it gained, and after a stop of 15 or 20 minutes, and finding the fire was steadily gaining on them, they decided to go to Warrior for help, and cut loose from the rest of the train, and ran to Warrior, distant about 4 miles; that they had been running about 18 miles an hour, the rules allowing 30. The seals on the doors, which he broke, were all right; they had three iron buckets on the train, holding a little more than a common water bucket, and the engine stack had a spark arrester on it. He also further testified, that he went to Warrior because he had to get the train off the main line to let the passenger train, coming north, pass them; that it took about 8 minutes to run to Warrior; went into Warrior blowing fire alarm; stayed 20 or 25 minutes

there, and turning the burning car over to the side-track man he went back for the other cars left on the line near Reeds; that the fire was so hot at Warrior they could not get into the car, after having battered the door in with railroad iron, and the wagons were so packed in the car, they could not get them out, further than that a few pieces were prized out.

Seay, the flagman, testified that standing in the cupola with the conductor he saw the fire, which burst out like from a big pile of kindling; that he did not go to the burning car, but went back to the top of the hill, as the rules required him to do, to signal any train that might be coming behind them, the rule being, that if for any reason the forward train is required to stop it must send back the flagman, to flag any train that may be behind; that he stayed about 50 minutes when they called him in; that when they got to Warrior, about two-thirds of the top of the car was on fire, and 25 or 30 people were there.

Frank Smith, a brakeman, testified that after turning over the hill below Blount Springs, being on the third car from the engine, he saw smoke coming from under the edge of the roof of the car of wagons; that the swingman ran to tell the conductor, and witness ran to tell the engineer; that when he went back, there was no blaze coming out, and he could not get water from the bucket he brought with him from the tender into the fire; that the conductor then had them to open the door, when they saw the blaze in the back end of the car, but could not get to it; that he then went back to the engine and got a coal pick and cut a hole in the top, and when he did so, the blaze first came out, and he poured in a bucket of water, but the hole was not large enough and some of the water was lost; that they poured in five or six buckets of water, and the conductor said there was no use to try, as we could not put out the fire; that they had three buckets and he and Williams brought the water; that he did not think the engineer and fireman went back to the burning car; the buckets were of iron and held two gallons; that witness brought only two buckets of water from the engine and the swingman brought one from the caboose; that there was no water tank at Warrior, but there was a branch there, from which water could not have been brought fast enough to put out the fire.

The evidence for defendant further tended to show, that after the car arrived at Warrior, where they had no arrangements for extinguishing fires and with the appliances at hand, the fire could not have been extinguished.

We have been careful to set out, in as brief space as possible, the main features of the evidence bearing on the question in hand as delivered by the witnesses. It occurs to us, assuming that there is no material conflict in the evidence, as contended by defendant, that different minds might reasonably draw different inferences and conclusions therefrom, as to whether defendant's employees by due care and diligence might

## Notes

or not have extinguished the fire when it was first discovered. This involves the other inquiries, whether they were dilatory or not in bringing water from the tank to pour on the flames at the place in the car at which the flame appeared at the time to be confined; whether or not they cut a large enough aperture in the roof through which to flood the fire when discovered, and whether they might not have used more water for the purpose than they did; whether or not, the conductor exercised good discretion in opening one of the doors of the car, which admitted fresh quantities of air to the flames; and whether or not it was best to go to Warrior, where there were no facilities for extinguishing the fire, or return to Blount Springs, where there was a great tank of water susceptible of ready use in flooding the car, etc. Under such a state of proof, the question of the exercise of due diligence on the part of the employees was one for the determination of the jury, and not for the court as a matter of law to decide.

We cannot, without extending this opinion to an extraordinary length, for no good purpose as it seems to us, follow the vast array of assignments of error not likely to arise on another trial. We have considered those most material, and in so doing have stated principles sufficient for the guidance of the court on another trial.

Reversed and remanded.

## NOTES.

**Reduced Rates as Consideration for Contract Limiting Liability of Carriers of Freight.**—See *Maunheim Ins. Co. v. Erie & W. Transp. Co.* (Minn.), 13 Am. & Eng. R. Cas., N. S., 161, and *notes*, 168 *et seq.*

**VALIDITY OF CONTRACTS LIMITING LIABILITY OF CARRIERS OF FREIGHT  
FOR LOSSES NOT RESULTING FROM NEGLIGENCE.**

**General Rule.**—In the absence of a constitutional or statutory provision to the contrary, a carrier may, by special contract, limit its common-law liability, provided the stipulation is based on a valuable consideration, and does not so limit or exempt from liability for negligence of the carrier.

*United States.*—*Leitch v. Union R. R. Transp. Co.*, Fed. Cas. No. 8,224; *Muser v. Holland*, 17 Blatchf. (U. S.) 412; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Ormsby v. Union Pac. R. Co.* (C. C.), 4 Fed. 706; *The Pacific Fed. Cas.*, No. 12,644; *York Co. v. Central R. R.*, 70 U. S. (3 Wall.) 107, 18 L. Ed. 170.

*Alabama.*—*Grey v. Mobile Trade Co.*, 55 Ala. 387, 28 Am. Rep. 729; *Mobile, etc., R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Rep. 607; *South & N. A. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578.

*Arkansas.*—*Taylor v. Little Rock, etc., R. Co.*, 32 Ark. 398, 29 Am. Rep. 1, 39 Ark. 148, 18 Am. & Eng. R. Cas. 590; *Pacific Exp. Co. v. Wallace*, 60 Ark. 100, 29 S. W. 32; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397.

*California.*—*California Powder Works v. Atlantic & P. R. Co.*, 113 Cal. 329, 45 Pac. 691.

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*Colorado*.—Merchants' Dispatch, etc., Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757.

*Connecticut*.—Camp v. Hartford & N. Y. Steamboat Co., 43 Conn. 333; Welch v. Boston, etc., R. Co., 41 Conn. 333; Southern Exp. Co. v. Barnes, 36 Ga. 532.

*Georgia*.—Purcell v. Southern Express Co., 34 Ga. 315.

*Illinois*.—Black v. Wabash, etc., R. Co., 111 Ill. 351, 53 Am. Rep. 628, 25 Am. & Eng. R. Cas. 388; Field v. Chicago & R. I. R. Co., 71 Ill. 458; Illinois Cent. R. Co. v. Jonte, 13 Ill. App. (13 Bradw.) 424; Illinois Cent. R. Co. v. Morrison, 19 Ill. 136; Merchants' Dispatch Transp. Co. v. Leyson, 89 Ill. 43; Oppenheimer v. United States Exp. Co., 69 Ill. 62, 18 Am. Rep. 596; Wabash, etc., R. Co. v. Peyton, 106 Ill. 534, 46 Am. Rep. 705, 18 Am. & Eng. R. Cas. 1.

*Indiana*.—Bartlett v. Pittsburgh, etc., R. Co., 94 Ind. 281, 18 Am. & Eng. R. Cas. 549; Indianapolis, D. & W. Ry. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138; St. Louis & S. E. R. Co. v. Smuck, 49 Ind. 302; Thayer v. St. Louis A. & T. H. R. Co., 22 Ind. 26, 85 Am. Dec. 409.

*Iowa*.—Hazel v. Chicago, M. & St. P. R. Co., 82 Iowa 477, 48 N. W. 926; McCoy v. Keokuk, etc., R. Co., 44 Iowa 424.

*Kansas*.—Kallman v. United States Exp. Co., 3 Kan. 198; Kansas Pac. R. Co. v. Reynolds, 17 Kan. 251.

*Kentucky*.—Louisville & N. R. Co. v. Crozier, 13 Ky. Law Rep. 175; Rhodes v. Louisville, etc., R. Co., 9 Bush (Ky.) 688.

*Louisiana*.—Roberts v. Riley, 15 La. Ann. 103, 77 Am. Dec. 183; Simon v. Steamship Fung Shuey, 21 La. Ann. 363; Thomas v. The Morning Glory, 13 La. Ann. 269, 71 Am. Dec. 509.

*Maine*.—Willis v. Grand Trunk R. Co., 62 Me. 488.

*Maryland*.—Baltimore & O. R. Co. v. Brady, 32 Md. 333; McCoy v. Erie & W. Transp. Co., 42 Md. 498.

*Massachusetts*.—Buckland v. Adams Express Co., 97 Mass. 124, 93 Am. Dec. 68; Squire v. New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162.

*Michigan*.—McMillan v. Michigan, Southern & N. I. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Michigan Cent. R. Co. v. Hale, 6 Mich. 243.

*Minnesota*.—Jacobus v. St. Paul, etc., R. Co., 20 Minn. 125, 18 Am. Rep. 360, 1 Cent. L. J. 375.

*Mississippi*.—Mobile, etc., R. Co. v. Weiner, 49 Miss. 725; Southern Exp. Co. v. Hunnicutt, 54 Miss. 566, 28 Am. Rep. 385.

*Missouri*.—Craycroft v. Atchison, T. & S. F. Ry. Co., 18 Mo. App. 487; Duvenick v. Missouri Pac. R. Co., 57 Mo. App. 550; Hance v. Wabash Western Ry. Co., 56 Mo. App. 476; Kirby v. Adams Exp. Co., 2 Mo. App. 369; Oxley v. St. Louis, etc., R. Co., 65 Mo. 629; Potts v. Wabash, St. L. & P. Ry. Co., 17 Mo. App. 394.

*Nebraska*.—Atchison, etc., R. Co. v. Washburn, 5 Neb. 117.

*New Hampshire*.—Durgin v. American Exp. Co. (N. H.), 9 L. R. A. 453; Hall v. Cheney, 36 N. H. 26.

*New Jersey*.—Ashmore v. Pennsylvania Steam-Towing, etc., Co., 28 N. J. L. 180.

*New York*.—Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575, 51 Barb. 69, 34 How. Prac. 421; Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Boswell v. Hudson River R. Co., 18 N. Y. Sup. Ct. (5 Bosw.) 699, 10 Abb. Prac. 442; Dorr v. New Jersey Steam Nav. Co., 11 N. Y. (1

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Kern.) 485, 62 Am. Dec. 125; *Moore v. Evans*, 14 Barb. 524; *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith (N. Y.) 115; *Lee v. Marsh*, 28 How. Prac. (N. Y.) 275; *Lansberg v. Dinsmore*, 4 Daly (N. Y.) 490; *Slocum v. Fairchild*, 7 Hill (N. Y.) 292; *Stoddard v. Long Island R. Co.*, 7 N. Y. Sup. Ct. (5 Sandf.) 180; *Sunderland v. Wescott*, 40 How. Prac. 468, 32 N. Y. Sup. Ct. (2 Severny) 260.

*North Carolina*.—*Lee v. Raleigh*, etc., R. Co., 72 N. Car. 236.

*Ohio*.—*Erie R. Co. v. Lockwood*, 28 Ohio St. 358; *Gaines v. Union Transp. & Ins. Co.*, 28 Ohio St. 418; *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 285; *Pittsburgh, C. & St. L. R. Co. v. Barrett*, 36 Ohio St. 448.

*Pennsylvania*.—*American Exp. Co. v. Sands*, 55 Pa. St. 140; *Farnham v. Camden & A. R. Co.*, 55 Pa. St. (5 P. F. Smith) 53; *Gordon v. Little*, 8 Serg. & R. (Pa.) 533, 11 Am. Dec. 632.

*South Carolina*.—*Levy v. Southern Express Co.*, 4 S. Car. 234; *Swindler v. Hilliard*, 2 Rich. Law (S. Car.) 286, 45 Am. Dec. 732.

*Tennessee*.—*Deming v. Merchants' Cotton-Press & Storage Co.*, 90 Tenn. (6 Pickle) 306, 17 S. W. 89, 13 L. R. A. 518; *Dillard v. Louisville & N. R. Co.*, 70 Tenn. (2 Lea) 288.

*Texas*.—*Galveston*, etc., R. Co. *v. Allison*, 59 Tex. 193, 12 Am. & Eng. R. Cas. 28; *Houston & T. C. R. Co. v. Park*, 1 White & W. Civ. Cas. Ct. App. § 334; *Missouri Pac. R. Co. v. Harris*, 1 White & W. Civ. Cas. Ct. App. §§ 1257, 1260, 1262; *Texas & P. Ry. Co. v. Davis*, 2 Willson, Civ. Cas. Ct. App. § 192.

*Vermont*.—*Kimball v. Rutland*, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567.

*Virginia*.—*Richmond & D. R. Co. v. Payne*, 6 L. R. A. 849, 86 Va. 481; *Wilson v. Chesapeake*, etc., R. Co., 21 Gratt. (Va.) 654.

*West Virginia*.—*Baltimore & O. R. Co. v. Skeels*, 3 W. Va. 556; *Berry v. West Virginia & P. R. Co.* (W. Va.), 11 Am. & Eng. R. Cas., N. S., 103; *Brown v. Adams Express Co.*, 15 W. Va. 812.

*Wisconsin*.—*Detroit*, etc., R. Co. *v. Farmers'*, etc., Bank, 20 Wis. 122; *Morrison v. Phillips & C. Constr. Co.*, 44 Wis. 405, 28 Am. Rep. 599.

*England*.—*Lowe v. Booth*, 13 Price 329.

A common carrier may limit its common-law liability to any extent, so long as such feature of the contract of shipment is not repugnant to the requirements of public policy. *Potts v. Wabash, St. L. & P. Ry. Co.*, 17 Mo. App. 394.

A corporation which was made a common carrier by its charter, and required to "transport merchandise and property without showing partiality or favor," had the same power to contract for a limitation of its liability as any other carrier, and no consideration of public policy was contravened by the exercise of such power. *Michigan Cent. R. Co. v. Hale*, 16 Mich. 243.

**Not by Stipulation in Receipt.**—A railroad cannot limit its liability for goods lost beyond its own lines, by a stipulation in the receipt that it shall not be liable for safe transportation of the goods after they are delivered to other parties for completing transportation or delivery, although he may do so by an express contract, which may be proved outside of the receipt. *Southern Exp. Co. v. Barnes*, 136 Ga. 532.

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**May Become a Private Carrier for Hire.**—The carrier may by special contract restrict his common-law liability; and where this is done his relations are changed, and he becomes as to that transaction an ordinary bailee and private carrier for hire, which imposes upon him the responsibility of exercising ordinary care in the transportation of property. *French v. Buffalo & E. R. Co.*, 2 Abb. App. Dec. (N. Y.) 196, 4 Keyes 108; *Blossom v. Dodd*, 43 N. Y. 264; *Lake Shore & M. S. R. Co. v. Perkins*, 23 Mich. 329, 5 Am. Ry. Rep. 249; *Meyer v. Harnden's Exp. Co.*, 24 How. Pr. (N. Y.) 290.

**Stipulation for Benefit of Insurance.**—A carrier can provide in his contract of shipment that he shall have the benefit of any insurance effected upon the goods to be transported, and that if the owner has received from the insurance company the amount of the loss he will be precluded by such stipulation from recovering against the carrier. *Gulf, C. & S. F. R. Co. v. Zimmerman*, 81 Tex. 605, 17 S. W. Rep. 239; *Peck v. North Staffordshire R. Co.*, 10 H. L. Cas. 473, 9 Jur., N. S., 914, 32 L. J., Q. B. 241, 11 W. R. 1023, 8 L. T. 768; *Ashenden v. London, B. & S. C. R. Co.*, L. R., 5 Ex. D. 190, 42 L. T. 586, 28 W. R. 511, 44 J. P. 203.

**May Become Insurer by Agreement.**—By a contract limiting a carrier's liability he becomes an insurer by agreement, and according to its terms. If there be a loss, the agreement furnishes the extent of liability, unless the plaintiff can show that the loss occurred through the wilfulness or negligence of the carrier. *Farnham v. Camden & A. R. Co.*, 55 Pa. St. 53.

**Property the Carrier Is Not Bound to Carry.**—A railroad charter only binds the company as a common carrier to transport such property as was usually transported by railroad companies at the time the charter was granted; and where cattle were not transported by rail at the time a charter was granted, the company is not bound to transport them as a common carrier, unless it holds itself out to the public as transporting them, or enters into a special contract to do so. *Michigan, S. & N. I. R. Co. v. McDonough*, 21 Mich. 165.

**Same—Explosives.**—As a carrier is not bound to accept powder for transportation it may accept it upon such terms as it may think necessary, and may make a special contract for its carriage releasing the carrier from liability for loss occasioned by fire from any cause whatever. *California Powder Works v. Atlantic & P. R. Co.*, 4 Am. & Eng. R. Cas., N. S., 301, 113 Cal. 329, 45 Pac. Rep. 691.

**Contract Requiring Regulations as to Delivery and Entry of Packages, etc.**—A common carrier may so limit its common-law liability by a contract requiring reasonable regulations relating to manner of delivery and entry of packages, information as to their contents, etc., as to be liable only according to the terms of such contract. *Kallman v. United States Exp. Co.*, 3 Kan. 198.

**Only Liable as Forwarder.**—Where the contract for shipment provides that the carrier shall be liable only as "forwarder," the shipper cannot recover against such carrier for the loss of the goods, unless he shows that the loss resulted from the carrier's negligence. *Kallman v. United States Exp. Co.*, 3 Kan. 198.

**Property of Unusual Value.**—Where the property delivered for trans-

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portation is of unusual and extraordinary value, a condition that the carrier will not be responsible for the loss if the true character and value of the articles are not stated and extra freight paid will operate to exempt the carrier from liability even for his own negligence, unless he was informed when or before the goods were received that they were of such special and unusual value. *Rathbone v. New York C. & H. R. R. Co.*, 140 N. Y. 48, 55 N. Y. S. R. 306, 35 N. E. Rep. 418.

**Loss by Fire.**—A common carrier may by special contract avoid or limit his liability at common law as an insurer of property intrusted to him against loss or damage by fire occurring without his own fault. *Hoadley v. Northern Transp. Co.*, 115 Mass. 304; *Rand v. Merchants' Dispatch Transp. Co.*, 59 N. H. 363.

**United States.**—*Van Schaach v. Northern Transp. Co.*, 3 Biss. (U. S.) 394; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 10 Biss. (U. S.) 18; *Eells v. St. Louis, K. & N. W. Ry. Co.*, 52 Fed. Rep. 903; *York Mfg. Co. v. Illinois C. R. Co.*, 3 Wall. (U. S.) 107.

**Arkansas.**—*Little Rock, M. R. & T. R. Co. v. Talbot*, 18 Am. & Eng. R. Cas. 598, 39 Ark. 523; *St. Louis, etc., R. Co. v. Bone*, 52 Ark. 26.

**Louisiana.**—*New Orleans Mut. Ins. Co. v. New Orleans, etc., R. Co.*, 20 La. Ann. 302.

**Massachusetts.**—*Grace v. Adams*, 100 Mass. 505; *Judson v. Western R. Co.*, 6 Allen (Mass.) 486; *Pemberton Co. v. New York C. R. Co.*, 104 Mass. 144; *Squire v. New York C. R. Co.*, 98 Mass. 239.

**New York.**—*Germania Fire Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90, 28 Am. Rep. 115; *Platt v. Richmond, Y. R. & C. R. Co.*, 32 Am. & Eng. R. Cas. 517, 108 N. Y. 358, 11 Cent. Rep. 101, 15 N. E. Rep. 393, 13 N. Y. S. R. 660; *Shelton v. Merchants' Dispatch Transp. Co.*, 59 N. Y. 258, 48 How. Pr. 257.

**Pennsylvania.**—*Adams Exp. Co. v. Sharpless*, 77 Pa. St. 516.

**South Carolina.**—*Levy v. Southern Exp. Co.*, 4 S. Car. 234.

**Tennessee.**—*Deming v. Merchants' C. P. & S. Co.*, 90 Tenn. 306, 17 S. W. Rep. 89; *Lancaster Mills v. Merchants' Cotton-Press Co.*, 45 Am. & Eng. R. Cas. 423, 89 Tenn. 1, 14 S. W. Rep. 317.

**Vermont.**—*Davis v. Central Vermont R. Co.*, 66 Vt. 290, 44 Am. St. Rep. 852.

**Canada.**—*Dionne v. Canadian Pac. R.*, 1 Montr. L. R. (Sup. Ct.) 168; *Armstrong v. Grand Trunk R. Co.*, 18 New Bruns. 445.

**Same—Limiting Liability to Own Line.**—The carrier may by special contract limit his liability for loss to his own line, for loss by fire without his fault, and for other loss not attributable to negligence; and may require the value of the goods to be fixed by the shipper. He cannot, even by express contract, exempt himself from liability for gross negligence, or wilful misconduct of himself or his servants, nor can he limit his liability in amount in such cases. *Chicago & N. W. R. Co. v. Chapman*, 42 Am. & Eng. R. Cas. 392, 133 Ill. 96, 24 N. E. Rep. 417, *affirming* 30 Ill. App. 504.

**Same—Goods in Depot Awaiting Shipment.**—The railroad company was exonerated from liability for three hogsheads of tobacco, destroyed by the burning of the depot at which they were received for shipment, by the stipulation inserted in the bills of lading that the company "shall not be liable for loss or damages by fire or other casualty while in



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transit, or while in depots or landings at points of delivery, etc." The shipper received and retained the bills of lading until after the tobacco was destroyed by the burning of the depot, though he might have returned them before the burning. *Louisville & N. R. Co. v. Brownlee*, 14 Bush (Ky.) 590.

A carrier is released from liability for loss of goods by fire while awaiting transshipment in the company's depot under a bill of lading issued in another state, stipulating that no carrier shall be liable for loss by fire from any cause, or that no carrier shall be liable for loss by fire while goods are awaiting transshipment to any point. *Brown v. Louisville & N. R. Co.*, 36 Ill. App. 140.

**Same—Destroyed on Steamer Route Connecting Defendant's Railway.**—Defendant received a case of goods from the plaintiff's agent at W. consigned to the plaintiff at M., and issued a bill of lading among the conditions of which were that the company would not be responsible for loss by fire, or while the goods were not on the defendant's railway. The plaintiff's agent at W. signed a shipping bill requesting the company to receive the goods on these conditions. The goods were destroyed by fire on a steamer running from A. through Lake Superior—a route connecting two portions of the defendant's railway, but the steamer was not under the defendant's control. *Held*, that the conditions were reasonable, that the plaintiff had sufficient notice and was bound thereby, and that the company was relieved from responsibility, in the absence of any averment or proof that the loss was caused by the fault of the defendant or of those for whom it was responsible. *Dionne v. Canadian Pac. R. Co.*, 1 Montr. L. R. (Sup. Ct.) 168.

**Same—In Warehouse of Compress Company.**—A carrier is not liable for cotton found in warehouse of a compress company, where the bill of lading contained a fire clause exempting the carrier from liability for loss by fire or other casualty in or at any cotton press, although the compress company was the carrier's agent to receive the cotton. *Deming v. Merchants' C. P. & S. Co.*, 90 Tenn. 306, 17 S. W. Rep. 89, 13 L. R. A. 518.

**Same—Act of Mob.**—A provision in a bill of lading exempting the carrier from liability for "loss or damage of any article or property whatever by fire or other casualty while in transit or while in depots or places of transshipment," applies to a case where a lawless mob takes the goods while in transit and burns them, where the negligence of the carrier does not contribute to such loss. *Hall v. Pennsylvania R. Co.*, 3 Am. & Eng. R. Cas. 274, 1 Fed. Rep. 226.

Goods were shipped under a provision in a bill of lading that the carrier should not be liable for "loss or damage by fire, unless it could be shown that such loss or damage occurred through negligence or default of the agents of the company." Upon the arrival of the goods at their place of destination, the car in which they were stored was taken possession of by a mob of strikers against the military power of the state, and was burned. *Held*, that the owner must prove that the loss was the result of the negligence or default of the company's agents, and that without such proof the company was not liable. *Wertheimer v. Pennsylvania R. Co.*, 17 Blatchf. (U. S.) 421, 1 Fed. Rep. 232.

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**Same—Offer of Reasonable Alternative to Shipper.**—A fire clause in a bill of lading which stipulates that the carrier shall not be liable for loss or damage by fire, is to be deemed just and reasonable only when a reduced rate is made and the shipper is offered the alternative of shipping the goods at full rates under a bill of lading containing no such stipulation. *Louisville & N. R. Co. v. Gilbert*, 42 Am. & Eng. R. Cas. 732, 88 Tenn. 430, 12 S. W. Rep. 1018, 7 L. R. A. 518.

In this action, it appeared that the cotton destroyed by fire had been shipped under a bill of lading containing a fire clause exempting the carrier from liability for loss or damage by fire. The freight agent at the point of shipment testified that he had no authority as freight agent to make a different contract or to ship goods under any other form of bill of lading, and that the company had not supplied him with other forms. He also testified that before he could make a contract for the shipment of goods at tariff rates it was necessary that he should have authority from the general freight agent of the company. It appeared from the evidence that the rate on cotton before the insertion of the fire clause was the same as it was when shipped under a bill of lading containing it. *Held*, that as the company had not fulfilled its duty at common law, to hold itself in readiness to transport goods with all the responsibility of a common carrier, in so far as it had not authorized its agent at the point of shipment to make such contracts, no reasonable alternative had been offered to the shipper and that the stipulation in the bill of lading was unjust and unreasonable.

**Delay, Loss of Markets, etc.**—A stipulation that the carrier shall not be liable for loss of market, or other delay arising from detention, is reasonable. *White v. Great Western R. Co.*, 2 C. B., N. S., 7, 26 L. J. C. P. 158; *Webb v. Great Western R. Co.*, 26 W. R. 111.

A fish merchant delivered fish to a railway company to carry upon a signed contract, relieving the company as to all fish delivered by him "from all liability for loss or damage by delay in transit or from whatever other cause arising," in consideration of the rates being one-fifth lower than where no such undertaking was granted; the contract to endure for five years. The servants of the company accepted the fish, although from pressure of business they could not carry it in time for the intended market, and the fish lost the market. *Held*, that upon the facts the merchant had a *bona fide* option to send fish at a reasonable rate with liability on the company as common carriers, or at the lower rate upon the terms of the contract; that the contract was in point of fact just and reasonable within section 7 of the Ry. & C. Tr. Act 1854, and covered the delay; and that the company were not liable for the loss. *Manchester, S. & L. R. Co. v. Brown*, 8 App. Cas. 703, 53 L. J. Q. B. D. 124, 4 Ry. & C. T. Cas. xviii.

A contract by which a company undertakes to relieve itself of all liability for damages occasioned by any delay in transportation, and to impose them upon the shipper, will be effectual to protect the company only against the consequences of delays not caused by its own negligence. *Dawson v. Chicago & A. R. Co.*, 18 Am. & Eng. R. Cas. 521, 79 Mo. 296; *Jennings v. Grand Trunk R. Co.*, 49 Am. & Eng. R. Cas. 98, 127 N. Y. 438, 28 N. E. Rep. 394, 40 N. Y. S. R. 318.

**Delay Caused by Strike.**—In an action for delay in the transportation

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of cattle, it appeared that the cattle were received for transportation from a point in Texas to Chicago, the bill of lading providing that the carrier should be liable only while the cattle were on its own road. The route over that was wholly within the state, and the delay was caused by the refusal of the connecting lines to receive the cattle on account of a strike on their roads. *Held*, that the provisions limiting the time in which suit could be brought, and releasing the carrier from liability for delay caused by strikes, are valid, whether the contract of shipment be considered as interstate or as one to be wholly performed within the state. *Gulf, C. & S. F. R. Co. v. Gatewood* (Texas Sup. Ct., Dec. 1890), 14 S. W. Rep. 913.

**Delay on Connecting Road.**—Where a shipper agrees to assume all risks of loss or injury from delays in transportation, this relieves the company of liability for a loss caused by a delay occasioned by an obstruction on another road, which suddenly diverts business to defendant's road. *Dawson v. Chicago & A. R. Co.*, 18 Am. & Eng. R. Cas. 521, 79 Mo. 296.

**Stipulation Requiring Claim for Loss of Goods to Be Made within Fixed Time.**—See *Dixie Cigar Co. v. Southern Express Co.* (N. Car.), 10 Am. & Eng. R. Cas., N. S., 863, and *note*, 863 *et seq.*

**Stipulation Limiting Time in Which Suit Must Be Brought.**—See *Texas & P. Ry. Co. v. Reeves* (Tex.), 8 Am. & Eng. R. Cas., N. S., 429, and *note*, 430 *et seq.*

**Stipulation Limiting Liability Where Goods Are to Be Delivered at Flag Station Where There Is No Protection from Weather.**—See *Allan v. Pennsylvania R. Co.* (Pa.), 10 Am. & Eng. R. Cas., N. S., 347, and *note*, 352 *et seq.*

**Limiting Liability to Carrier's Own Line.**—See *Louisville & N. R. Co. v. Tarter* (Ky.), 7 Am. & Eng. R. Cas., N. S., 607, and *note*, 609.

## PEOPLE

v.

## PRESIDENT, ETC., OF DELAWARE &amp; H. CANAL CO.

(Court of Appeals of New York, Jan. 22, 1901.)

[59 N. E. 138.]

**Railroads—Board of Commissioners—Freight Depots—Personal Inspection.\***—Under Laws 1890, c. 565, § 161, which, in regulating the powers and duties of the railroad commissioners, provides that if, in the judgment of the board, "after a careful personal examination of the same," it appears that additional terminal facilities should be afforded, the board shall give notice, etc., the board could avail itself of a personal inspection by its inspector, and need not make an actual examination of physical objects to support its recommendation that the erection of a freight depot by defendant railroad was necessary.

PARKER, C. J., and VANN and WERNER, JJ., dissenting.

\*As to the powers of railroad commissioners, see generally, *note*, 8 Am. & Eng. R. Cas., N. S., 613 *et seq.*

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Appeal from supreme court, appellate division, Third department.

Mandamus by the people against the President, Managers, and Company of the Delaware & Hudson Canal Company to compel the erection of a freight station. From a judgment of the appellate division (52 N. Y. Supp. 850) in favor of plaintiff, defendant appeals. Affirmed.

Lewis E. Carr, for appellant.

Edward P. Coyne, for the People.

Bartlett, J. We should be content to affirm this judgment on the opinion of the learned appellate division were it not for the fact that a point was argued at our bar which was not considered below. As we approve and adopt the opinion of the appellate division, we shall confine our discussion to this one point. The counsel for the appellant insists that the recommendation of the railroad commissioners cannot be upheld and enforced by the courts, because it appears upon its face that they did not, in making it, act or proceed in obedience to the provisions of the statute. The railroad law (Laws 1890, c. 565) provides (section 161), in regulating the powers and duties of the railroad commissioners, as follows: "If in the judgment of the board; after a careful personal examination of the same, it shall appear that repairs are necessary upon any railroad in the state, or that any addition to the rolling stock, or any addition to or change of the station or station houses, or that additional terminal facilities shall be afforded, or that any change of the rates of fare for transporting freight or passengers or in the mode of operating the road or conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, the board shall give notice," etc. The contention of the appellant is that the commissioners failed to make the personal examination of the premises required by the statute, and that this omission goes to the jurisdiction of the board to act. It is further urged that this defect appears upon the face of the papers, and could not be cured by oral proof, or by any action on behalf of the people at any stage of the proceedings. In support of this last suggestion reference is made to the report of the railroad commissioners where it states as follows: "That prior to such hearing the board caused a personal inspection of the premises to be made through its inspector, the report of which is on file." It is also argued that, while it is doubtful if the report advises the erection of a freight depot, but, if so, it was not at the place fixed by the commission. This narrow and technical construction of the statute ought not to prevail. It was the obvious intention of the legislature to impose upon the railroad commissioners the duty of a careful personal ex-

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amination of the subject of repairs or changes upon which they were to act, and it would be unreasonable to hold that the commissioners could not avail themselves of the expert or general knowledge of inspectors they may employ. If repairs of the roadbed were under consideration, the judgment of a disinterested track master might be given weight, as the opinion of one unfamiliar with the practical operation of a railroad would be of little or no value. If curves were alleged to be dangerous, or bridges insecure, the commissioners would naturally call in the civil engineer and the bridge builder. If additional rolling stock or depots were deemed necessary to secure the convenience and accommodation of the public, the commissioners would avail themselves of the knowledge and experience of unbiased and practical railroad men as calculated to aid them in reaching a just conclusion. In the case before us neither the formal nor informal report of the inspector was adopted, thus showing that the commissioners did not delegate to the inspector any portion of their official duty, but reserved to themselves the power of independent action in the premises. We do not mean to intimate that there may not be presented to the railroad commissioners a case where the statutory command of personal examination of the subject may not require them to visit and inspect the locus in quo, but in the case at bar no personal examination of the location of the freight depot was necessary.

The litigated question was whether the freight depot of the defendant at Green Island was so situated as to meet the demands of freight shippers doing business in West Troy, and, if not, was the volume of freight shipments to and from West Troy over the railroad of the defendant sufficient to justify the commissioners in recommending that the defendant erect a freight depot in West Troy? This question, under the alternative writ of mandamus, was tried before a learned referee, who decided that the recommendation of the commissioners that a freight depot should be erected by the defendant in West Troy was just and reasonable. The location of this freight depot, if it was to be built, was not a matter of dispute. The learned counsel for the defendant states in his brief as follows: "It was conceded by the defendant that when the matter of a freight station at West Troy was first agitated the officers of the company expressed a willingness to build, and bought some land on the south side of Nineteenth street with the view of making use of it for that purpose; but, when the matter was looked into more carefully, it was found that the business that would be likely to go through a freight house would not justify the expense of building and maintaining it." This fairly states the situation, the true issue. The trial court has decided that the freight business will justify the building and maintaining of a freight house, and the railroad commissioners have recommended its erection upon the land already purchased for that purpose by the defendant. The judgment and order

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appealed from should be affirmed, with costs, on the above opinion and the opinion below.

Cullen, J. I concur in the affirmance of the judgment appealed from. I concede that the action of the board of railroad commissioners preliminary to the notice given to the railroad company must be in substantial compliance with the requirements of the statute, or the recommendation of the board cannot be enforced. In my opinion, the statute does not require that there shall be a personal inspection by the members of the board of any physical objects. The statute (Laws 1890, c. 565) reads: "Sec. 161. Recommendations of Board, When Repairs or Other Changes are Necessary.—If in the judgment of the board, after a careful personal examination of the same, it shall appear that repairs are necessary upon any railroad in the state, or that any addition to the rolling stock, or any addition to or change of the station or station houses, or that additional terminal facilities shall be afforded, or that any change of the rates of fare for transporting freight or passengers or in the mode of operating the road or conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public," etc. Now, what is "the same," a personal examination of which on the part of the commissioners is required by the statute? Plainly, it is the subjects which are subsequently enumerated,—whether repairs are necessary, additions to the rolling stock, additions or changes in the station houses, changes in the rates of fare for freight or passengers, or in the mode of operating the road or conducting its business. Certainly some of these subjects—such as the rates of fare—are not the subject of inspection or perception through the senses. In the case at bar a view of the premises would throw but little, if any, light upon the question presented to the commissioners for determination. The propriety of requiring the defendant to erect a freight station would depend principally on the amount of freight offered to it at the particular point for transportation, not on a single day, or at the particular time the commissioners might visit the premises, but during the season or year. Information as to these dominant facts could not be obtained by any inspection of the railroad. The same is true as to the question of the adequacy of the rolling stock. Looking at the engines and cars would throw no light on the question whether the company had provided sufficient rolling stock for its business. In my opinion, the personal examination required by the statute is not to be construed as meaning a personal inspection of physical objects, but a personal consideration by the commissioners of the subject matter on which action is sought.

Vann, J. (dissenting). I dissent, because the railroad commissioners failed to make a personal examination of the locus in quo, as required by section 161 of the railroad law, which is as follows: "Sec. 161. Recommendations of Board, When

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Repairs or Other Changes are Necessary.—If in the judgment of the board, after a careful personal examination of the same, it shall appear that repairs are necessary upon any railroad in the state, or that any addition to the rolling stock, or any addition to or change of the station or station houses, or that additional terminal facilities shall be afforded, or that any change of the rates of fare for transporting freight or passengers or in the mode of operating the road or conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, the board shall give notice and information in writing to the corporation of the improvements and changes which they deem to be proper, and shall give such corporation an opportunity for a full hearing thereof, and if the corporation refuses or neglects to make such repairs, improvements and changes, within a reasonable time after such information and hearing, and fails to satisfy the board that no action is required to be taken by it, the board shall fix the time within which the same shall be made, which time it may extend. It shall be the duty of the corporation, person or persons owning or operating the railroad to comply with such decisions and recommendations of the board as are just and reasonable. If it fails to do so the board shall present the facts in the case to the attorney general for his consideration and action, and shall also report them in its annual or in a special report to the legislature." Laws 1890, c. 565, § 161. The power of the board to decide and recommend that the change in question should be made is derived wholly from the section quoted, and the supreme court has power to compel compliance, as authorized by the next section, only in case the board has proceeded according to the positive requirements of the statute in making the decision and recommendation. *Id.* § 162. The supreme court cannot act without a recommendation, and, if the recommendation presented was made in violation of law,—which is apparent from an inspection thereof,—it is void, and the court has no jurisdiction to issue its writ of mandamus to compel the railroad company to make the change. The decision and recommendation in question, as presented to the supreme court, showed upon its face that the inspection of the premises was made, not by the commissioners in person, but through an agent employed by them. The subject was not left to presumption, but the commissioners fairly stated in their decision that "the board caused a personal inspection of the premises to be made through its inspector, the report of which is on file." No other inspection is mentioned either in the decision or in the evidence, although the return to the alternative writ presented the issue, and cast upon the people the burden of showing that a personal examination was made, if such were the fact. The command of the statute with reference to a personal examination is not directory, but mandatory. Two investigations are required before the court can compel the

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railroad company to make the proposed change. The first is wholly ex parte, while the second is after notice and an opportunity to be heard. The first, however, unless wholly negative in result, is the basis of an important decision; for, as the statute directs, "if, in the judgment of the board, after a careful personal examination of the same, it shall appear" that a change is necessary, "the board shall give notice and information in writing to the corporation of the improvements and changes which they deem to be proper." The decision thus made on the basis of a personal examination stands as the final decision of the board, and, if it is just and reasonable, the company must comply therewith, unless at the hearing which may be had it is able to "satisfy the board that no action is required to be taken by it." No further decision is required unless the board changes its mind, except to simply "fix the time within which" the improvement must be made. The company is thus required to comply or contest, and, if it fails to do either, the supreme court can compel compliance to the extent that the recommendation is just and reasonable. Upon the application for this purpose "the findings of the board shall be presumptive evidence of the facts therein stated, and the recommendations of the board shall be deemed prima facie to be just and reasonable." Section 162. If the company contests the matter, it has to meet a prima facie case already established by the ex parte investigation, and it has the burden of satisfying the board that its preliminary decision was wrong. As the first investigation may lead to such important results, the method of investigation, so far as provided by statute, should be strictly complied with. The only method mentioned is "a careful personal examination." While other sources of information may be, this source must be, resorted to. When the statute says "personal examination" it means an examination made by the commissioners, or some of them, in propria persona, of the place where the proposed improvement is to be made. The power exercised by them was delegated by the legislature, whose province it is, in the first instance, to require railroad companies to erect freight depots when deemed proper. This power was delegated with the express command that it should be exercised after a personal examination by the board. It thus became the duty of the commissioners, or a majority of them, to personally examine the locus. In the absence of express authority, they could not delegate that power to another. "Delegatus non potest delegare." When a power belonging exclusively to the state is delegated by the legislature to a board, the statute must be strictly construed, and the method of procedure provided must be strictly followed. 23 Am. & Eng. Enc. Law, p. 394. In all jurisdictions this is so held of the power to condemn land or levy assessments, and the power under consideration is of the same summary character. The personal examination required by statutes of condemnation or by



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statutes authorizing local assessments cannot be delegated; and the board of railroad commissioners, as deputies of the state, could not assign to a deputy of their own the power of making the examination which the statute commanded them to make in person. In making the decision or recommendation the commissioners acted as judges. *People v. Board of Railroad Com'rs*, 158 N. Y. 421, 53 N. E. 163. The personal examination was the evidence upon which they were commanded to act in making the decision, and no report of an agent, however skillful, could take the place of a personal view of the premises. They were to pass judgment upon what they saw, not upon what they heard from an inspector. Courts have repeatedly recognized the fact that it is impossible for one human being to so describe a locality or situation as to place in the mind of another as perfect a picture as can be derived from personal observation. Therefore the power delegated by the board to its agent could not be as well exercised by him as by them, and the reason for the positive requirement of the statute thus becomes manifest. The omission to comply with the statute appeared upon the face of the decision, without which the supreme court has no jurisdiction. The commissioners had no jurisdiction to make their decision, and their want of jurisdiction permeated the entire proceeding, and deprived the special term of the power to issue the writ of mandamus. While this defect was substantially raised by the return to the alternative writ, as it went to the jurisdiction of both tribunals it could be raised at any stage of the litigation. *Bank v. Judson*, 8 N. Y. 254. I think it was the duty of the commissioners to make the examination in person; that their decision, made without complying with this requirement, was void upon its face; and that it conferred no power upon the supreme court to act. I therefore vote for reversal.

Gray, Martin, and Cullen, JJ., concur with Bartlett, J., for affirmance. Parker, C. J., and Werner, J., concur with Vann, J., for reversal.

Order affirmed.

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HICKS, ATTY. GEN., *ex rel.* ASKEW

*v.*

SMITH *et al.*

(*Supreme Court of Wisconsin, March 19, 1901.*)

[85 N. W. 512.]

**Fee to Land Covered by Right of Way—Warranty Deed.**—A railroad receiving a warranty deed to a strip of land for its track acquires a title in fee, subject, at most, to forfeiture for nonuser or misuser, and not a mere easement.

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\*See generally, 7 Rap. & Mack's Dig., 75 *et seq.*

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**Same—Same—Authority to Acquire Easement Only—Ultra Vires—Collateral Attack.**—A conveyance in fee to a railroad authorized to acquire an easement only is valid until assailed in a direct proceeding by the government, and cannot be collaterally attacked by private persons.

**Purpresture—Abatement.**—A mere purpresture is liable to abatement in a suit in equity by the attorney general, though it is not a public nuisance.

**Same—Same.**—Where the attorney general filed a complaint to abate a purpresture, which was also claimed to be a private nuisance, but the proof showed that the purpresture invaded public rights only, and was not a private nuisance, it was the duty of the court to render judgment of abatement; the attorney general not having discontinued as to the public right.

Appeal from circuit court, Dane county; George Clementson, Judge.

Suit by E. R. Hicks, attorney general, on the relation of Samantha B. Askew, against Denton B. Smith and others. From a decree for defendants, plaintiff appeals. Reversed.

This is an action in equity brought by the attorney general of the state, in his official capacity, upon the relation of a private citizen, to abate and remove certain structures erected in the waters of Lake Monona, at the foot of Henry street, in the city of Madison. The structures complained of are alleged to be purprestures and public nuisances, as well as invasions of the riparian rights of the relator as owner of part of lot 1, block 70, in the city of Madison.

The relator claims to own to the original shore of the lake, by reason of facts hereafter to be stated. Between the lines of her occupation and the shore of the lake as it existed prior to 1868 there was a distance of about 15 feet, such shore being nearly at right angles with the lots. At some time prior to October, 1868, the Chicago, Milwaukee & St. Paul Railway Company built a railway track on said shore line, the center line of said track being practically on said original shore line. Said company afterwards filled in dirt, and built another track, and at a still later period made a contract with the Chicago & Northwestern Railway Company under which said last-named company was allowed to, and did, make a further filling, and constructed two tracks still further out in the original bed of the lake, and outside of the last track was constructed a retaining wall. The structures complained of in this action consists of a pier and a boat house for storage and repair of boats outside of this retaining wall, and standing in shallow water upon the bottom of the lake, and have been used by George W. Smith, the original defendant, and since his death by his heirs, the present defendants, for carrying on the business of a boat livery. Said structure stands in shallow water, from 2 feet to 2 feet and a half in depth.

The facts of the case were not greatly in dispute, and the

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court found the same, in substance, as follows: Block 70 was platted by the proprietors of the land as a part of Madison in 1837, and lot 1 of said block had a length of about 280 feet, extending from Wilson street, on the northwest, to Lake Monona, on the southeast. One Dean became the owner of said lot 1 in 1852, and prior to October, 1868, the Milwaukee & St. Paul Railway Company constructed a single-track railroad across the lot at its lake end; the center line thereof being the shore line of the lot. October 29, 1868, Dean and wife executed a deed in fee simple to said railroad company, conveying to it and its successors and assigns, forever, a piece of land from the lake end of said lot, described as follows: "A strip or piece of land 48 feet wide, extending across lot 1, block 70, in the city of Madison, through which strip or pieces of land the line of the railroad of said company is now located, so as to leave 15 feet in width on the inside (in shore) from the center, and 33 feet in width of said strip on the outside of said center line (lake side)." This deed conveyed to the railway company 15 feet of said lot next to the lake, and purported to cover 33 feet of the lake adjoining said 15-foot strip. Prior to 1883 the name of the Milwaukee & St. Paul Railway Company was changed to the Chicago, Milwaukee & St. Paul Railway Company; and since the time of the execution of the said deed from Dean said company has continuously occupied and used said land, from a certain retaining wall built by it about 8 feet northwest of the center line of its track, for a roadbed, and has always occupied contiguous land made by filling in the bed of the lake. July 26, 1869, Dean and wife conveyed to one Nietert the following land: "Four rods square off from the southeast end of lot 1, block 70, city of Madison." October 23, 1873, Nietert and wife conveyed the same property to the relator by the same description. Nietert, after receiving his deed, went into possession of the piece of land 4 rods square adjoining on the northwest the strip of land deeded to the railway company, and built a dwelling thereon, which was his homestead, and has been the homestead of the relator since she purchased it; but neither Nietert nor the relator ever had possession of that part of lot 1 now occupied by the railway company. September 20, 1873, Dean and wife delivered to Bridget Minehan a deed of the following land: "All of the southeast one-half of lot 1, block 70, excepting 48 feet from the southeast end of said lot sold to the M. & St. P. R. R. Co., and another piece off the same end, four rods square, lying next to the railway track aforesaid, sold to Nietert." On the 18th of May, 1874, the administrator of the estate of Bridget Minehan, deceased, conveyed the last-named tract of land to George W. Smith, who went into possession thereof, built his homestead there, and occupied the same until his death, in September, 1899, since which time it has been occupied by his widow. George W. Smith died intestate, and the present

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defendants are his heirs. Shortly after Smith purchased said property he built a small pier in the lake at the edge of the railroad embankment as it then existed, and commenced the business of boat livery, which increased until it brought him an income of about \$600 per year; and the present defendants have continued that business since his death, the boat house being enlarged as the business increased. Prior to 1883 the Chicago, Milwaukee & St. Paul Railway Company, constructed a second track outside of its first track; and in 1883 the same company conveyed to the Chicago & Northwestern Railway Company the right to operate its then existing track along the shore of said lake, and construct another track on the lake side thereof, which said last-named company did in 1898, and extended its roadbed towards the lake by filling in the lake. During the year 1898 and since that time there have been four railroad tracks in operation; the three outside tracks at the place in question being over what was originally the bed of the lake; the width of the made land from the original shore line being 51 feet. When the Chicago & Northwestern Railway Company was about to lay its second track, it was arranged between the said company and Smith that the company should move his boat house, platform, etc., out into the lake, outside of its retaining wall, which the company in fact did. Said boat house is now 4 feet from said retaining wall. The width of the boat house is 18 feet, and its length 60 feet. On the lakeside is a platform for landing, and at Henry street is a pier extending 68 feet into the lake, 5 feet in width for a part of the way, and 3 feet for the remainder. The boat house is used for storing boats and repairing them. The side of the boat house next the shore is supported by stones, and the other parts of the boat house and the pier have piles driven into the ground. The water of the lake where the boat house stands is shallow, and only navigable by rowboats; the depth at the outer edge of the platform being 2 feet, and at the end of the pier, 2 feet 6 inches. Neither the boat house nor the pier or platform have obstructed navigation, nor have they inconvenienced the public in any way. The public have always used the pier, with the consent of the owners, without charge; hence the court found that said structures were not public nuisances.

From these facts the court concluded: That the title of Dean to lot 1 extended only to the edge of the water; the land under the water being the property of the state, held in trust for the public. The deed from Dean to the railway company vested in that company absolute title to the land described in the deed, except the part covered by the waters of the lake. The deed from Dean to Nietert conveyed the piece of land 4 rods square next to the piece sold to the railway company. Neither Nietert nor the relator ever had title to the shore of lot 1, and never had any riparian rights, and as to the relator

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the defendant's structures are not a private nuisance. That the structures of the defendants constituted an unauthorized occupation of state land, but did not constitute a public nuisance, and it would serve no good purpose to the public, and would be a grievous injury to the defendants, to abate the same. That the attorney general, though a party to the action, has taken no part therein, and has not asked, on behalf of the state, that the court abate said structure, and has expressly declined to make such request, and the court therefore declines to render such judgment. Upon these findings, judgment was rendered dismissing the complaint on the merits as to the relator, with costs, and as to the attorney general without prejudice and without costs, from which judgment the attorney general appeals.

E. R. Hicks, Atty. Gen., and Sanborn, Luce, Powell & Ellis, for relator.

Rufus B. Smith, for respondents.

Winslow, J. (after stating the facts). Lake Monona is a meandered lake, navigable in fact. The title to its bed is in the state in trust for legitimate public uses, such as fishing, navigation, and the like; and the state cannot convey it away for private use, nor can it abdicate the trust. McLennan v. Prentice, 85 Wis. 427, 55 N. W. 764; Priewe v. Improvement Co., 93 Wis. 534, 67 N. W. 918, 33 L. R. A. 645; Mendota Club v. Anderson, 101 Wis. 479, 78 N. W. 185; Village of Pewaukee v. Savoy, 103 Wis. 271, 79 N. W. 436; Rev. St. 1898, § 1607a. A structure built upon the bed of the lake, not in aid of navigation (e. g. a building in which to store and repair boats), is a purpresture,—an invasion both of the state's title and the right of the public. A pier may lawfully be built by a riparian owner in aid of navigation, through shoal water to navigable water, if not prohibited by state law; but, if built by one not a riparian owner, it is an unauthorized structure, and an invasion of the rights of the state and the public, because the right to erect such a pier is simply an incident of riparian ownership. Larson v. Furlong, 63 Wis. 323, 23 N. W. 584; Cohn v. Boom Co., 47 Wis. 314, 2 N. W. 546. Applying these legal principles to the facts as found by the trial court, which are amply supported by the evidence, it is entirely clear that the boat house was and is a purpresture, because it is not an aid to navigation and that the pier is a purpresture, because those who built and maintain it are not riparian owners; and these were the conclusions reached by the trial court. The trial court further held, however, that the relator was not a riparian owner; that the structures were not shown to be actually obstructions to navigation, or nuisances in fact, but, rather, conveniences to the public; and that the attorney general having taken no active part in the litigation, and declined to come into court and ask judgment

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of abatement on behalf of the state, the court, sitting as a court of equity, would not abate the structures.

With the first proposition, namely, that the relator is not a riparian owner, we entirely agree. The deed made by Dean to the railway company in 1868 was a deed conveying in fee simple the southeast end of the lot, and covered the shore line; the railway company had power, by its articles of association, "to acquire, use, and sell, bargain, lease, and convey, all kinds of property, real and personal, necessary or convenient to operate, use, or maintain its railroad." But the appellant's contention is that the railway company could only acquire an easement or limited fee in lands to be used for right of way purposes, and that hence, notwithstanding the language of the deed, it must be construed as simply conveying such easement, and that the relator, having by subsequent deed acquired the southeast end of the lot, owns the shore and all riparian rights, subject only to the easement of the railway company. *Railway Co. v. Aldridge*, 135 N. Y. 83, 32 N. E. 50, 17 L. R. A. 516. It was held by this court nearly 20 years ago, in the case of *Messer v. Oestreich*, 52 Wis. 684, 10 N. W. 6, that, when a railway company received a warranty deed of a strip of land for its track, the company did not take a mere easement, but a title in fee, subject at most to forfeiture for non-user or misuser. If it be granted that the railway company had no power to acquire a fee in its right of way, but only an easement therein, still the making and delivering to it of a deed of the fee would transfer the title. The transaction would be *ultra vires*, but, upon principles now well established, it would be valid until assailed in a direct proceeding brought for that purpose by the government. Private persons could not attack it in collateral actions. *Farwell Co. v. Wolf*, 96 Wis. 10, 70 N. W. 289, 71 N. W. 109. The relator is not, therefore, a riparian owner, and suffers no private injury.

Thus far we agree, in substance, with the conclusions reached below. The trial judge, however, concluded that navigation was in no way injured by the structures, and so, although they were purprestures, they were not public nuisances; that, the attorney general not appearing in court and asking abatement thereof on behalf of the state, a court of equity would not abate them. With this conclusion we cannot agree. It is true that a purpresture on the public land is not necessarily a public nuisance. *Gould, Waters* (2d Ed.) § 21. A purpresture is a permanent invasion of the public land. A nuisance is an injury to the public rights of navigation, fishing, and the like. It is true that it has been held in California that a court of equity in this country has not the power to decree the abatement of a mere purpresture, which is not a public nuisance. *People v. Davidson*, 30 Cal. 379. A different conclusion was, however, reached in *People v. Vanderbilt*, 26 N. Y. 287, where it was distinctly held that a mere purpresture is liable to abatement in an action in equity

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at the suit of the attorney general, irrespective of the question whether it is actually a nuisance, and that the offer to prove that a purpresture, such as a pier in navigable waters, was not in fact injurious to navigation, was properly overruled. Similar conclusions were reached in *Revell v. People*, 177 Ill. 468, 52 N. E. 1052, and *United States v. Ranch Co.* (C. C.) 25 Fed. 465. The authorities cited in those cases entirely justify the decisions, and we have no hesitation in adopting the latter rule. The complaint before us was framed in the double aspect of a complaint to enforce the rights of the state, and the private rights of an alleged riparian owner as well, but the proof showed that there were no riparian rights in the relator. The case of the state, however, remained fully proven and unaffected by the failure of the private claim. Thus it stood when judgment was rendered: A complaint charging a purpresture on the lands of the state, and demanding its removal, filed by the proper officer. The proof showing all the facts essential to a judgment as prayed in the complaint. The attorney general had not withdrawn, nor attempted to withdraw, the complaint, or discontinue the action. We cannot but think that, under the circumstances, it was the duty of the court to render judgment of abatement. What might have been the duty of the court, had the attorney general applied for leave to discontinue as to the public right, we need not consider, for there was no such application. Judgment of abatement of the illegal structures, as invasions of the public domain, should have been rendered. Judgment reversed and action remanded, with direction to render judgment for the plaintiff as prayed in the complaint.

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*HUTCHINSON et al.**v.**MISSOURI PAC. RY. CO.**(Supreme Court of Missouri, Nov. 12, 1900.)*

[61 S. W. 635.]

**Accidents at Crossings—Failure to Ring Bell Immaterial Where Whistle Was Heard.\***—It is immaterial that the bell of an engine which struck a person at a crossing was not rung as required by statute; she having notice of the approach of the train, having heard and recognized the whistle, and seen the headlight.

**Same—Contributory Negligence and Speed in Violation of Ordinance—Question for Jury.†**—Whether a person attempting to go over a railroad crossing, in front of a train, in the nighttime, who had stopped to

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\*See *State v. Cumberland & P. R. Co.* (Md.), 10 Am. & Eng. R. Cas., N. S., 511, and *note*, 518 *et seq.*

†Speed in violation of ordinance as negligence, see *Jackson v. Kansas City, etc., R. Co.* (Mo.), 19 Am. & Eng. R. Cas., N. S., 99, and *note*, 119 *et seq.*

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pick up something she had dropped, was negligent, is for the jury ; the speed of the train being 35 miles an hour, while an ordinance provided it should not exceed 6 miles per hour, and there being no evidence that she knew or had reason to apprehend that it was running faster than authorized.

ROBINSON, SHERWOOD, and MARSHALL, JJ., dissenting.

In banc. Appeal from circuit court, St. Charles county.

Action by Robert L. Hutchinson and others against the Missouri Pacific Railway Company. Judgment for defendant. Plaintiffs appeal. Reversed.

The following opinion was delivered in division No. 1 :

“Valliant, J. This is a suit for damages for the killing of plaintiffs' mother, which they allege was caused by the negligence of defendant. The plaintiffs are minors suing by their next friend. Their mother was a widow. The  
Case Stated. allegations of the petition are that the plaintiffs' mother on January 3, 1892, was struck and instantly killed by an engine drawing a passenger train within the limits of the city of St. Louis, while she was in the act of crossing the track at a passenger station with a view of reaching a platform provided by defendant for that purpose, from which she intended taking passage on a train of defendant. The acts of negligence charged are that the defendant ran its engine and cars without ringing the bell for the crossing as the statute requires, and ran the train at the speed of thirty miles an hour within the city, in violation of an ordinance of the city which provided that it was unlawful to run it at a higher rate than six miles an hour. The prayer of the petition is for judgment for \$5,000. The answer admits that the ordinance was in force at the time of the accident, but avers that it was repealed in 1893, denies all other allegations, and sets up a plea of contributory negligence, which is denied by the reply. The evidence for plaintiffs tended to show the following: Benton, where the accident occurred, is a station on defendant's road in the western part of the city. Defendant has a station house there, on the north side of its tracks, for the accommodation of its passengers. It has double tracks,—the north track for the west-bound, and the south for the east-bound, trains. There was a platform on each side of the tracks. That on the south side was designed for passengers taking the east-bound trains. To go from the station house to the south platform, one would cross both tracks. On January 3, 1892, Mrs. Hutchinson, the plaintiffs' mother, came to this station, with the purpose of taking the accommodation train, as it was called, going east, which train was due there at 6:38 p. m. The exact time of her arrival at the station is not established, but is approximately given. It was stated that she had left the house of her daughter to go to the station about six o'clock, and the distance was about a half mile. A witness (Mr. Banghart), who was in the station with her, estimated it to be about 6:20 p. m. when they heard the whistle, and she and he



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went out of the station together to cross over to the south platform. Another witness thought it was within three or five minutes of the time for the accommodation train. Ellendale is a station a half mile to the west. A train at Ellendale coming east could be clearly seen from the platform in front of the station on the north side of the tracks at Benton, and from the north track and from the space between the tracks; but from the platform on the south side it could not be seen for more than 300 or 500 feet, owing to an embankment and pile of ties obstructing the view. Mrs. Hutchinson was in the habit of visiting her daughter, and had frequently taken the train from that station, but usually went in on an earlier train. The night of the accident was cold and dark. Mrs. Hutchinson and Mr. Banghart were in the station house, where there was a light and fire, awaiting the accommodation train. She had a ticket to the Union station. They heard a whistle in the direction of Ellendale, when Mrs. Hutchinson said: "That is our train. We will have to be in a hurry." And she and Banghart immediately arose and went out on the platform in front of the station, where they stopped and looked west. The headlight of the train coming from Ellendale was plainly visible. She said: "This is our train. We better be in a hurry, to get across." They both started to go across the tracks, Mrs. Hutchinson a little ahead, but Mr. Banghart passed her. When she reached the middle of the south track she dropped a lace scarf she was carrying in her hand, and paused and stooped to pick it up. She caught it, but while she was rising, and before she had attained an erect position, the engine of the approaching train, which proved to be the mail train, running at the speed of thirty-five miles an hour, struck her and killed her instantly. Banghart barely reached the platform in safety. The train stopped about a hundred yards from the point of the accident, in consequence of it. That station was not a stopping point for that train, and but for the accident it would not have stopped there at all. The witnesses all testified that they heard no bell, but they all heard the whistle at Ellendale, and saw the headlight. At the close of the plaintiffs' evidence the court gave an instruction to the effect that the plaintiffs were not entitled to recover, whereupon they took a nonsuit, with leave, and, after an ineffectual motion to set it aside, have brought the cause here for review.

"1. The fact, if it be a fact, that the engine bell was not rung as the statute requires, is immaterial, under the other facts of the case. The object of ringing the bell is to give notice of the approach of the train; but in this instance that was unnecessary, because Mrs. Hutchinson heard and recognized the whistle, and saw the headlight. She knew the train was coming, and required no further warning. The failure to ring the bell, though an act of negligence, could not have contributed to the catastrophe.

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"2. But the city ordinance forbade the running of the train at a higher rate than six miles an hour, and this train was running at the rate of thirty-five miles an hour. That act was negligence per se, and if it was the cause of the accident the defendant was liable, unless the deceased contributed to the result by her own negligence. This proposition has been so often and so elaborately discussed and demonstrated, and as a rule of law so often declared by this court, that it is now only necessary to restate it, and cite some of the decisions in which it is discussed: *Karle v. Railroad Co.*, 55 Mo. 476; *Bowman v. Railroad Co.*, 85 Mo. 533; *Merz v. Railway Co.*, 88 Mo. 672; *Keim v. Transit Co.*, 90 Mo. 314, 2 S. W. 427; *Rafferty v. Same*, 91 Mo. 33, 3 S. W. 393; *Eswin v. Railway*, 96 Mo. 290, 9 S. W. 577; *Schlereth v. Railway Co.*, 96 Mo. 509, 10 S. W. 66; *Grube v. Same*, 98 Mo. 336, 11 S. W. 736, 4 L. R. A. 776; *Kellny v. Same*, 101 Mo. 68, 13 S. W. 806, 8 L. R. A. 783; *Murray v. Same*, 101 Mo. 236, 13 S. W. 817; *Hanlon v. Same*, 104 Mo. 381, 16 S. W. 233; *Bluedorn v. Same*, 108 Mo. 439, 18 S. W. 1103; *Gratiot v. Same*, 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189; *Prewitt v. Railway Co.*, 134 Mo. 615, 36 S. W. 667. When the plaintiffs' mother heard the whistle in the direction of Ellendale, and went out on the platform, and there saw the headlight of the approaching train, if she knew or could discern the rate of speed at which it was approaching, and had attempted to cross the tracks as she did, she would have been guilty of such negligence as would prevent a recovery. Whether, in the darkness of the night, and under the circumstances surrounding her, she is to be regarded as knowing or capable of discerning the speed at which the train was coming, is a question of fact upon which minds might reasonably differ, and the court could not settle it as a matter of law. And as it is a fact of common experience that railway trains, as they lawfully may, not infrequently do run past some passenger stations without stopping, and at a rate of thirty-five or forty miles an hour, if the plaintiffs' mother, without knowing and without being able to discern the speed of the train, had assumed that it was running at a less rate, and, acting on that assumption, had attempted to cross as she did, the court would have been justified in adjudging her negligent, unless there was some other fact in the case to justify her assumption. But there was that other fact in this case. The city ordinance prohibited the train running at a higher rate than six miles an hour, and, in the absence of proof that she knew or had reason to apprehend to the contrary, the law will presume that she trusted, as she had a right to trust, that the defendant was running its train at not more than six miles an hour, in obedience to the ordinance, and that she regulated her movements accordingly. This court has frequently so declared the law. *Eswin v. Railway Co.*, 96 Mo. 290, loc. cit. 295, 9 S. W. 577; *Kellny v. Railway Co.*,

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101 Mo. 67, loc. cit. 77, 13 S. W. 806, 8 L. R. A. 783; Jennings v. Railway Co., 112 Mo. 268, loc. cit. 276, 20 S. W. 490; Gratiot v. Railway Co., 116 Mo. 450, loc. cit. 464, 21 S. W. 1094, 16 L. R. A. 189; Sullivan v. Same, 117 Mo. 214, loc. cit. 222, 23 S. W. 149. Even with the train running, as it was, at thirty-five or forty miles an hour, the movements of the plaintiffs' mother were such that she had reached the middle of the south track, and had almost reached the platform, as Banghart, who started across with her, in fact had done, when the engine struck her. It is, therefore, entirely reasonable to conclude that if the train had approached at the rate of only six miles an hour she would have passed in safety, even though she paused to pick up the scarf which had dropped. If, then, she was acting, as the law, in the absence of any proof to the contrary, will presume she rightfully was, on the assumption that the train was approaching at the rate of not more than six miles an hour, the court had no right to conclude, as a matter of law, that her conduct was not such as might be expected of a reasonably prudent person. The question of whether, under those conditions, she was guilty of negligence was one of fact for the jury. The instruction in the nature of a demurrer to the evidence ought not have been given. The judgment is reversed, and the cause remanded to the trial court, to be retired in accordance with the law as herein declared. All concur, except Marshall, J., who dissents."

A. R. Taylor, for appellants.

Martin L. Clardy, for respondent.

Per Curiam. The foregoing opinion filed by Judge Valiant in this cause while it was pending in division No. 1 of the court is approved and adopted as the opinion of the court in banc by the majority of our number.

Burgess, C. J., and Brace and Gantt, JJ., concur in said opinion. Robinson, Sherwood, and Marshall, JJ., dissent.

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STACKER

v.

LOUISVILLE & N. R. Co.

(*Supreme Court of Tennessee, Feb. 16, 1901.*)

[61 S. W. 766.]

**Assignments of Error.**—Where, on appeal, the pages of the record on which testimony rejected by the trial court and exceptions to the rejections are to be found are not given, assignments of error on such rulings cannot be considered.

**Same.**—Assignments of error on the court's refusal to allow witnesses

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upon to help turn the engine by the employees of the road, so that this testimony, though incompetent, did get into the record.

It is said that the court erred in allowing third persons to state what the boy's mother said to him soon after he was hurt,—to the effect that she had warned him to keep away from the turntable, and that he was hardheaded. The pages where this testimony is to be found are not given, but in examining the record we find that two or more witnesses were asked as to the statements made by the mother; but no exceptions were made to the question or answer, so far as we can see from the record, and for these reasons this assignment is not well made.

It is said the court erred in not charging the jury that a minor is only chargeable with negligence to a degree equal to his capacity for discerning danger. It does not appear that the trial judge was asked to charge this language. He did charge upon the feature of the case presented by this request, and, as we think, correctly, and there is no error in this assignment.

It is said there is no evidence to support the verdict. The plaintiff was a boy about 12 years of age. His foot was caught at a turntable and slightly injured. His version is that he was called by the employees of the road to come to the turntable and assist in pushing the engine around. In this he is corroborated by two other boys about his age, and who, it appears, were with him. On the contrary, three of the company's employees, who were present and handling the engine, state that they did not see the boys there; that they were not called or invited to come to the turntable, and, if they were there, they were so concealed as not to be seen. It appears from the proof that these and other boys had often been warned away from this turntable by employees of the road, and told that it was dangerous; and the evidence tends to show that they kept themselves out of sight of the employees on this occasion, and were not seen until the accident occurred. There were two theories of the case presented to the jury,—one, that the boys were invited or told to come to the engine, and help to push it, by the railroad employees, and plaintiff was hurt while so doing; and the other is that the boys were often warned to stay away from the turntable, and were present on this occasion without the knowledge of the railroad employees. Both theories were supported by some evidence. The jury has given credit to that of the road, and there is evidence to sustain it; and the judgment of the court below is affirmed, with costs.

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Liability for Injury to Volunteer Servant.—See *Wagen v. Minneapolis & St. L. R. Co.* (Minn.), 17 Am. & Eng. R. Cas., N. S., 438, and *note*, 442 *et seq.*

Hengstler v. Flint & P. M. R. Co

**Duty of Railroad Company to Infant Trespassers.**—See *Tully v. Philadelphia, W. & B. R. Co.* (Del.), 20 Am. & Eng. R. Cas., N. S., 322, and extensive *note*, 327 *et seq.*

**Liability for Injuries to Children Riding on Cars by Permission of Employees.**—See *Burke v. Ellis* (Tenn.), 19 Am. & Eng. R. Cas., N. S., 695, and *note*, 701 *et seq.*

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HENGSTLER

v.

FLINT & P. M. R. Co.

(*Supreme Court of Michigan, Jan. 29, 1901.*)

[84 N. W. 1067.]

**Carriage of Live Stock—Validity of Written Contract.\***—H. delivered a car load of cows to defendant, as a common carrier, for shipment, without any special parol contract. He signed a written contract which contained nothing contrary to public policy. *Held*, that he could not defend upon the ground that the written contract was signed in haste and without reading.

**Same—Duty to Care for Stock.**—H. accompanied the stock. *Held*, that it was his duty, and not that of the defendant, to see that the stock was fed and watered.

Error to circuit court, Mason county; James B. McMahon, Judge.

Action by Andrew Hengstler against the Flint & Pere Marquette Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Plaintiff shipped a car load of cows from Ludington, Mich., to Charter Grove, Ill., a distance of 480 miles. The cows were loaded January 27th. Counsel for plaintiff erroneously state the time as the 28th. Plaintiff accompanied the car as care taker. The car left Ludington at 10 o'clock a. m. the 27th, and reached Flint, Mich., at 4 o'clock a. m. on the 28th. Plaintiff testified that the cows were uninjured when they reached Flint, except one, which got hooked down, and he left her at Flint. It is not claimed that the defendant was liable for this injury. Plaintiff unloaded the cows at Flint, watered and fed them, and left Flint over the Grand Trunk Railway at 4 o'clock p. m. of the 28th. He arrived at Charter Grove at 10 o'clock p. m. January 29th, the journey occupying about 60 hours from Ludington to Charter Grove. He was delayed 4 hours at one place, 4 hours at another, and 8 hours in the yards of the Illinois Central Railroad Company in Chicago. The cows were not unloaded, watered, or fed

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\*See notes at end of case.

*Hengstler v. Flint & P. M. R. Co*

from the time they left Flint until they reached Charter Grove. Plaintiff claims that the cows were injured on the journey in consequence of these delays, and brought suit to recover such damages. The court directed a verdict for defendant.

Fitch & Reek, for appellant.

M. B. Danaher (Frederick W. Stevens, of counsel), for appellee.

Grant, J. (after stating the facts). 1. The declaration contains three counts, each one of which is based upon the theory that the plaintiff was a shipper of live stock, that he delivered said stock to defendant, and that the defendant undertook and promised to take and use due and proper care and diligence in and about carrying and conveying the said property from Ludington to Charter Grove. No special contract for carriage, oral or written, is set up in the declaration. It is the ordinary declaration where goods are delivered to a railroad company for carriage in the usual course of business. After the cows were loaded, plaintiff received his bill of lading, and signed a contract providing that "said shipper is, at his own sole risk and expense, to load, take care of, and feed and water said stock while being transported"; also limiting its liability for loss or damage to negligence upon its own road, and not upon that of the connecting carrier. Plaintiff claims that this contract was presented to him for signature as the train was ready to start; that he had not time to read it, and did not read it; that he had a special oral contract for the shipping of these cows, which controls, rather than the written contract. Authorities are cited in support of the proposition. Plaintiff testified to conversations with defendant's agents at Ludington, upon which he bases his special contract. Being asked to state those conversations, he testified: "Well, we wanted to ship a car of cattle to my farm, and I inquired if I could get a regular cattle car, and they said they did not think so; it is unusual for them to get any such thing as that here; it is not used; and then Mr. Gordon said he would get another car for me, which I could take through to Charter Grove, Illinois, and I could buy some lumber and make a winter car out of it." This conversation does not disclose any definite agreement for shipment. The mere statement that the car could be shipped through to destination is not an agreement on the part of the defendant to be liable for all the delays and acts of negligence on the part of the connecting carrier. It was not an agreement to feed and water the cattle. This duty belongs to the shipper. *Heller v. Railway Co.*, 109 Mich. 53, 66 N. W. 667. It is not necessary, therefore, to consider the case upon the basis that plaintiff had a special oral contract differing from the written contract he signed previous to shipment. The provisions of this contract have

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been sanctioned by the decisions of this court. *McMillan v. Railroad Co.*, 16 Mich. 79; *Smith v. Express Co.*, 108 Mich. 572, 66 N. W. 479. There being no special parol contract, and there being nothing in the written contract contrary to public policy, plaintiff cannot now assert that the written contract is not binding because he signed it in haste, without reading.

2. Aside from this, it appears that the only injury the cattle could sustain was from failure to water and feed them. Plaintiff claims that he had no opportunity to do so upon the journey, after leaving Flint. He testified: "I spoke to the conductor and brakeman about feeding and watering whenever I had a chance. I told them the cattle would need a little water and feed, and they told me they could not give it to me." This testimony is not sufficient to fasten upon the defendant or any connecting carrier liability for damages resulting from failure to water and feed. The company was under no obligation to do so. Plaintiff does not testify that he could not have watered and fed them during the eight-hours stay in the yards of the Illinois Central at Chicago. It was his duty to see that they were then watered and fed. The language used by the circuit judge upon the trial was entirely justifiable: "He had no right to go through from Flint to Charter Grove without feeding and watering the cattle, and then expect the railroad to pay him for their depreciation and injury to them. It is idle to say a man could not feed a car load of cattle in Chicago. Of all places on earth, that is where he could feed them. Their arrangements there are perfect for that very purpose. If he allowed them to starve for lack of food and water, he cannot claim this railroad company is to blame for it. If he had been obliged, on account of the delay of the railroad, to lose time in feeding and watering, and put to extra expense, there would be some sense to such a claim; but to allow the cattle to starve for food and water, and to pass through Chicago without feeding them, and then claim that the railroad company should pay him for the cattle themselves, I think is a preposterous claim, and does not come under what is alleged in the declaration and set up against the company."

Judgment affirmed. The other justices concurred.

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NOTES.

**Bills of Lading—Parole Evidence.**—See *Stewart v. Cleveland, etc., Ry. Co. (Ind.)*, 13 Am. & Eng. R. Cas., N. S., 28, and *note*, 36 *et seq.*; *Tallassee Falls Mfg. Co. v. Western Ry. of Alabama (Ala.)*, 10 Am. & Eng. R. Cas., N. S., 339 *et seq.*

**Conflict of Oral and Written Agreements for the Transportation of Freight.**—See *note*, 13 Am. & Eng. R. Cas., N. S., 117 *et seq.*

**Parole Evidence as to Receipt Clause of Bill of Lading.**—See *Lake*

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Shore, etc., *R. Co. v. National Live-Stock Bank* (Ill.), 13 Am. & Eng. R. Cas., N. S., 1, and *note*, 16 *et seq.*

**BILLS OF LADING—WHETHER ASSENT OF SHIPPER IS CONCLUSIVELY PRESUMED FROM ACCEPTANCE.**

**Presumption Held Conclusive.**—According to the weight of authority, where the shipper of goods accepts a bill of lading or receipt from the carrier he is conclusively presumed, in the absence of imposition, accident, or mistake, to have assented to all the terms and conditions contained in it, and he cannot afterwards be heard to say that he did not read the instrument and did not know its contents. *Leitch v. Union R. R. Transp. Co.*, Fed. Cas. No. 8,224; *Wertheimer v. Pennsylvania R. Co.*, 1 Fed. Rep. 232, 17 Blatchf. (U. S.) 421; *Jones v. Cincinnati, S. & M. Ry. Co.*, 89 Ala. 376, 8 So. Rep. 61, 45 Am. & Eng. R. Cas. 321; *Western R. Co. v. Harwell*, 45 Am. & Eng. R. Cas. 358, 91 Ala. 340, 8 So. Rep. 649; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397, 8 S. W. Rep. 134, 7 Am. St. Rep. 104, 35 Am. & Eng. R. Cas. 635; *Central R.*, etc., *Co. v. Hasselkus*, 91 Ga. 382, 44 Am. St. Rep. 37, 55 Am. & Eng. R. Cas. 586, 17 S. E. Rep. 838; *Coles v. Louisville, E. & St. L. R. Co.*, 41 Ill. App. 607; *Mulligan v. Illinois Cent. R. Co.*, 36 Iowa 181, 14 Am. Rep. 514, 2 Am. Ry. Rep. 322; *Robinson v. Merchants' Dispatch Transp. Co.*, 45 Iowa 470; *Louisville, etc., R. Co. v. Brownlee*, 14 Bush (Ky.) 590; *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106; *McMillan v. Michigan Southern, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208; *Christenson v. American Express Co.*, 15 Minn. 270, 2 Am. Rep. 122; *Hutchinson v. Chicago, St. P., M. & O. Ry. Co.*, 37 Minn. 524, 35 N. W. Rep. 433; *Craycroft v. Atchison, etc., R. Co.*, 18 Mo. App. 487; *O'Bryan v. Kinney*, 74 Mo. 125; *Patterson v. Kansas City, Ft. S. & M. Ry. Co.*, 56 Mo. App. 657; *St. Louis, etc., R. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13; *Durgin v. American Exp. Co.*, 66 N. H. 277, 20 Atl. Rep. 328, 9 L. R. A. 453, 45 Am. & Eng. R. Cas. 325; *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Bishop v. Empire Transp. Co.*, 48 How. Pr. (N. Y. Sup. Ct.) 119; *Bostwick v. Baltimore & O. R. Co.*, 55 Barb. (N. Y.) 137; *Germania F. Ins. Co. v. Memphis, etc., R. Co.*, 72 N. Y. 90, 28 Am. Rep. 115; *Hill v. Syracuse, etc., R. Co.*, 73 N. Y. 357, 29 Am. Rep. 163; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *McMahon v. Macy*, 51 N. Y. 155, 4 Am. Ry. Rep. 393; *Soumet v. National Express Co.*, 66 Barb. (N. Y.) 284; *Whitehead v. Wilmington, etc., R. Co.*, 87 N. Car. 255, 9 Am. & Eng. R. Cas. 168; *Cincinnati, etc., R. Co. v. Pontius*, 19 Ohio St. 221, 2 Am. Rep. 391; *Newburger v. Howard & Co.'s Express*, 6 Phila. (Pa.) 174; *Wertheimer v. Pennsylvania R. Co.*, 8 W. N. C. (Pa.) 272; *Johnstone v. Richmond & D. R. Co.*, 39 S. Car. 55, 17 S. E. Rep. 512, 55 Am. & Eng. R. Cas. 346; *East Tennessee, V. & G. R. Co. v. Brumley*, 73 Tenn. (5 Lea) 401, 6 Am. & Eng. R. Cas. 356; *Merchants' Dispatch Transp. Co. v. Bloch*, 86 Tenn. 392, 6 Am. St. Rep. 847, 35 Am. & Eng. R. Cas. 579, 6 S. W. Rep. 881; *Ryan v. Missouri, etc., R. Co.*, 65 Tex. 13, 57 Am. Rep. 589, 23 Am. & Eng. R. Cas. 703.

**Statements of Rule.**—The shipper's assent to conditions inserted in the body of a bill of lading is conclusively presumed when he has had an opportunity to know its contents, has received it at the time of shipment,



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and the carrier has used no unfair means to deceive. *Ryan v. Missouri, K. & T. R. Co.*, 23 Am. & Eng. R. Cas. 703, 65 Tex. 13. A through bill of lading, advantageous to both, received by the plaintiff without objection, stipulating that the cotton was to be shipped "at company's convenience," is evidence of plaintiff's assent to the restriction of defendant's common-law liability, equivalent to an express agreement, and affects plaintiff with legal notice of its terms. *Whitehead v. Wilmington & W. R. Co.*, 9 Am. & Eng. R. Cas. 168, 87 N. Car. 255. Where a shipper accepts from a carrier a bill of lading containing a stipulation to the effect that the company should be exempted from injury to the goods occurring beyond the terminus of their own line, assent will be presumed upon the part of the shipper in the absence of fraud or mistake, and he will not be permitted to show that he was ignorant of the contents of the bill. *Mulligan v. Illinois C. R. Co.*, 36 Iowa 181, 2 Am. Ry. Rep. 322. In this case it appeared that the conditions of the bill of lading were printed upon its face, and the attention of the shipper was called thereto by the direction, "*Read this contract*," printed in italics.

**Failure to Read.**—Where goods are delivered to a carrier for transportation, and a bill of lading or receipt is given before the goods are shipped, the shipper is bound to examine it and ascertain its contents, and if he accepts it without objection he is bound by its terms. He cannot set up ignorance of its contents, and resort cannot be had to prior parole evidence to vary them; and to take the case out of this general rule it must appear that before the delivery of the bill of lading the goods had been shipped, so that the shipper could not have reclaimed them if he had objected to the terms of the bill of lading. *Germania Fire Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90, 28 Am. Rep. 115, *affirming* 7 Hun 233; *Hill v. Syracuse, B. & N. Y. R. Co.*, 73 N. Y. 351. In the absence of fraud or mistake a bill of lading containing special stipulations, signed by the shipper, is conclusive as to the terms of the contract, and he cannot invalidate it by showing that he signed it without reading it. *Western R. Co. v. Harwell*, 45 Am. & Eng. R. Cas. 358, 91 Ala. 340, 8 So. Rep. 649; *Leitch v. Union R. R. Transp. Co.*, Fed. Cas. No. 8,224; *Wertheimer v. Pennsylvania R. Co.*, 1 Fed. 232, 17 Blatchf. (U. S.) 421; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397, 8 S. W. Rep. 134, 7 Am. St. Rep. 104; *Hutchinson v. Chicago, St. P., M. & A. Ry. Co.*, 37 Minn. 524, 35 N. W. Rep. 433; *Patterson v. Kansas City, Ft. S. & M. R. Ry. Co.*, 56 Mo. App. 657; *Bostwick v. Baltimore & O. R. Co.*, 55 Barb. (N. Y.) 137; *Johnstone v. Richmond & D. R. Co.*, 39 S. Car. 55, 17 S. E. Rep. 512, 55 Am. & Eng. R. Cas. 346; *Texas & P. Ry. Co. v. Schrivener (Tex.)*, 2 Willson Civ. Cas. Ct. § 331.

In *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, 35 Am. & Eng. R. Cas. 635, 7 Am. St. Rep. 104, it was said in the opinion: "It has generally been held by the courts in this country and in England that such contracts are binding on the shipper, although he did not read or hear them read before signing, provided the carrier resorted to no unfair means, and practiced no fraud or imposition, and the shipper had the opportunity to know the contents. As said by Hutchinson on Carriers: 'There is nothing unreasonable in this. Every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant

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places now undertakes to carry his goods subject to the old common-law liability of the carrier. He knows, moreover, that bills of lading are constantly given, not only as the evidence of the receipt of the goods, but as an express and direct notice that they will be carried on certain terms. Knowing this, he cannot be wilfully blind, and plead ignorance when it was his duty to know; and knowing in such cases is assenting. If it was his intention to hold the carrier to his common-law liability, he should have said so, and have either declined to employ him, or sued him for his refusal, after tendering a reasonable sum for his services and risk.' Hutch. Carr. § 240; *McMillan v. Railroad Co.*, 16 Mich. 79; *Squire v. Railroad Co.*, 98 Mass. 239; *Long v. Railroad Co.*, 50 N. Y. 76; *McIlroy v. Buckner*, 35 Ark. 555; *Hallenbeck v. Dewitt*, 2 Johns. 404; *Rice v. Manufacturing Co.*, 2 Cush. 80, 87; *Harris v. Story*, 2 E. D. Smith 363, 367; *Lewis v. Railway Co.*, 5 Hurl. & N. 867; *Cooley, Torts*, 488-491; *Greenfield's Estate*, 14 Pa. St. 489, 504; *Hunter v. Walters*, L. R. 7 Ch. 75, 82, 84; *Morrison v. Construction Co.*, 44 Wis. 405, 409; *Fulmer v. Insurance Co.*, 36 Wis. 599, 603; *Long v. Railroad Co.*, 3 Amer. R. Rep. 350; *Mulligan v. Railway Co.*, 2 Amer. R. Rep. 322, 328; *Grace v. Adams*, 1 Amer. Rep. 131, 100 Mass. 505."

A railroad company's custom was to carry horses at the owner's risk, and at reduced rates for that reason, and the letters "O. R." signifying "Owner's Risk," were upon the receipt given to plaintiff for his horses, and retained and put in evidence by him; and he testified that "he did not see" those letters, but not that he did not understand their meaning. *Held*, that the restricted liability of the company clearly appeared from plaintiff's evidence. *Morrison v. Phillips & C. Constr. Co.*, 44 Wis. 405, 19 Am. Ry. Rep. 312.

But in *Adam's Express Co. v. Nock*, 2 Duv. (Ky.) 562, 87 Am. Dec. 510, it was held that evidence was admissible to show that the shipper did not read or understand or accept the bill of lading's printed condition limiting the liability of the carrier.

**Inability to Read.**—An express stipulation in a bill of lading, limiting the carrier's liability to loss or injury suffered on his own road, is binding on the consignor notwithstanding his ignorance and inability to read, when it is not shown that the carrier was informed of such ignorance or was asked to read and explain the bill of lading. *Jones v. Cincinnati, S. & M. R. Co.*, 45 Am. & Eng. R. Cas. 321, 89 Ala. 376, 8 So. Rep. 61.

#### CIRCUMSTANCES HELD SUFFICIENT TO REBUT PRESUMPTION.

**Where Stipulations Are Printed in Fine Type.**—It has been held that the presumption of the shipper's assent to the limitations of the carrier's liability arising from acceptance of the bill of lading was rebutted by the fact that they were printed in such fine type as to be almost illegible. *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Verner v. Sweitzer*, 32 Pa. St. 208.

But in *Ryan v. Missouri, etc., R. Co.*, 65 Tex. 13, 57 Am. Rep. 589, 23 Am. & Eng. R. Cas. 703, it was held that the mere fact that such limitations were in fine type did not render them void.

**Where Bill of Lading Is Received in Dimly-Lighted Car.**—Proof that an express company gave a receipt for baggage, at night, in a dimly-lighted and rapidly-running car, which attempts to limit the carrier's

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liability, is not sufficient evidence of a contract, where the provision is obscurely printed and there is nothing to show that the passenger assented to it. *Blossom v. Dodd*, 43 N. Y. 264.

**Where Clause Limiting Liability Was Rendered Unintelligible by Stamps.**—In an action against a common carrier for the value of goods lost in his custody, evidence that often, but not invariably, he had given to the plaintiffs receipts containing a printed clause limiting his liability for goods transported by him, and that in this instance, after receiving the goods, he gave to a servant of the plaintiff a receipt therefor, containing such a printed clause; but that over part of this clause in this receipt a stamp was so pasted as to render it unintelligible, and that until after the loss neither the plaintiff nor any of his agents or servants had actual knowledge of such a clause in this or any of the other receipts, is not sufficient to warrant a finding that the plaintiff assented to any limitation of the defendant's liability. *Perry v. Thompson*, 98 Mass. 249.

**Bill of Lading Received without Examination after Goods Had Been Shipped under Verbal Agreement.**—In an action against a carrier to recover for goods lost or damaged, the evidence tended to prove that the goods were shipped under a previous verbal agreement, without special exemptions in favor of the carrier, and that, after the goods were in transit, the bill of lading containing such exemptions were handed to the shipper, who received it without examination or objection. *Held*, that the shipper's acceptance of the bill of lading did not give rise to a presumption of his assent to the limitations of the carrier's liability embraced in the bill of lading. *Louisville, etc., R. Co. v. Meyer*, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44; *Baker v. Michigan Southern, etc., R. Co.*, 42 Ill. 73; *Merchants' Dispatch Transp. Co. v. Furthmann*, 149 Ill. 66, 41 Am. St. Rep. 265; *Missouri Pac. R. Co. v. Beeson*, 30 Kan. 298, 2 Pac. Rep. 496, 12 Am. & Eng. R. Cas. 52; *Southard v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 60 Minn. 382, 62 N. W. Rep. 442; *Bostwick v. Baltimore, etc., R. Co.*, 45 N. Y. 712; *Guillaume v. General Transp. Co.*, 100 N. Y. 491, 3 N. E. Rep. 489; *Lamb v. Camden & A. R. Co.*, 4 Daly (N. Y.) 483; *Swift v. Pacific Mail Steamship Co.*, 166 N. Y. 206, 30 Am. & Eng. R. Cas. 105; *Gaines v. Union Transp., etc., Co.*, 28 Ohio St. 418, 14 Am. Ry. Rep. 158; *Strohn v. Detroit, etc., R. Co.*, 21 Wis. 554, 94 Am. Dec. 564; *Northwest Transp. Co. v. McKenzie*, 25 Can. Sup. Ct. 38.

By the law of Massachusetts, in order to limit the carrier's common-law liability by a clause in the bill of lading, the bill of lading must be taken by the consignor, without dissent, at the time of the delivery of the property for transportation. When given a few days after the delivery of the goods, and while they are in transit, such a clause, not assented to by the consignee, will not be binding on the latter. *Michigan C. R. Co. v. Boyd*, 91 Ill. 268.

**Where Bill of Lading Was Subsequently Forwarded Because Incomplete When Goods Were Delivered.**—Assent by the shipper to a provision in a bill of lading will not be presumed where the bill, being incomplete at the time of the delivery of the goods to the carrier, was not delivered to the consignor at that time, but was subsequently corrected and forwarded by mail to him at the place of destination. *Louisville & N. R. Co. v. Meyer*, 27 Am. & Eng. R. Cas. 44, 78 Ala. 597.

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**Bill of Lading Received and Forwarded to Consignee, without Examination, after Goods Had Been Shipped under Verbal Agreement.**—In an action against a carrier to recover for goods lost the evidence for plaintiff tended to prove that the goods were shipped under a previous verbal agreement, without special exemptions in favor of the carrier, and that, after the goods were in transit, the bill of lading containing such exemptions was handed to the shipper, who, without examination or objection, forwarded it to the consignee, who made use of the same to receive and sell the goods not lost, and accounted to the shipper for the proceeds. *Held*, that it was error to charge the jury that such acts of the consignor and consignee were conclusive on the former, and bound him by the conditions contained in the bill, it appearing that he had no knowledge of such conditions, and never, in fact, assented to them. *Gaines v. Union T. & I. Co.*, 28 Ohio St. 418, 14 Am. Ry. Rep. 158; *Baltimore & O. R. Co. v. Campbell*, 36 Ohio St. 647.

**POSSESSION OF BILL OF LADING BY SHIPPER ONLY PRIMA FACIE EVIDENCE OF HIS CONSENT.**

Proof that a shipper took a receipt from a carrier containing provisions restricting the carrier's liability is only *prima facie* evidence of his assent to such limitations; and it is therefore open to explanation or contradiction by parole evidence. *Strohn v. Detroit & M. R. Co.*, 21 Wis. 554.

Possession by a shipper of a carrier's receipt for the property, containing special terms, is at least *prima facie* evidence of his assent to them, and in most cases may be conclusive. *Morrison v. Phillips & C. Constr. Co.*, 44 Wis. 405, 19 Am. Ry. Rep. 312.

A party shipped goods, to be carried by water as well as by land, and received a bill of lading containing a provision that the carrier should not be liable for loss or damage by fire or other casualty while in transit or at depots or landings at the point of delivery, and the goods were safely carried to their destination and stored in a suitable warehouse, where they were destroyed by fire on the night of the next day, without any fault on the part of the carrier. *Held*, that as there was no question made as to the knowledge of the shipper of the provision in the bill of lading, it would be inferred that he received it with knowledge of its contents and agreed to its terms, and consequently the carrier was not liable. *Anchor Line v. Knowles*, 66 Ill. 150.

Where a shipper of live stock pays the carrier the freight charges and receives a writing, without reading it, which he supposes contains merely a receipt, but which contains a contract exempting the carrier from liability for a failure to carry promptly, the shipper may show by parole a contract to deliver with dispatch. *King v. Woodbridge*, 34 Vt. 565.

It is error for the court to charge that the burden is upon a carrier to prove the shipper's knowledge of and assent to the stipulations of the bill of lading which he has accepted without objection; but such error is not material where the stipulation to which the charge applied was void. *Merchants' Dispatch Transp. Co. v. Bloch*, 35 Am. & Eng. R. Cas. 579, 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. Rep. 881.

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## SHIPPER'S ASSENT HELD TO BE A QUESTION FOR THE JURY.

Whether the shippers knew of the conditions of the bill of lading purporting to limit the carrier's liability, and assented to them, where he accepted and retained the bill without objection, is a question for the jury to be determined from all the facts and circumstances of the case. *Pereira v. Central Pac. R.*, 66 Cal. 92, 18 Am. & Eng. R. Cas. 565, 4 Pac. Rep. 988; *Wallace v. Sanders*, 42 Ga. 488; *Adams Express Co. v. Haynes*, 42 Ill. 89; *Adams Express Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *American Merchants' Union Express Co. v. Schier*, 55 Ill. 140; *Baker v. Michigan Southern, etc., R. Co.*, 42 Ill. 73; *Chicago, etc., R. Co. v. Simon*, 160 Ill. 648; *Field v. Chicago, etc., R. Co.*, 71 Ill. 458; *Illinois Cent. R. Co. v. Frankenburg*, 54 Ill. 88, 5 Am. Rep. 92; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Western Transit Co. v. Hosking*, 19 Ill. App. 607; *Missouri Pac. R. Co. v. Beeson*, 30 Kan. 298, 12 Am. & Eng. R. Cas. 52, 2 Pac. Rep. 496; *St. Louis & S. F. R. Co. v. Clark*, 55 Am. & Eng. R. Cas. 367, 48 Kan. 321, 29 Pac. Rep. 312; *Baltimore & O. R. Co. v. Brady*, 32 Md. 333.

In an action to recover damages for the death of hogs which had been transported over the railroad, the shipper claimed and testified that an oral contract was made for transportation to a point beyond the line of the contracting company, in which there was no limitation of liability, and that the stock was shipped under that contract; that, after the stock were loaded and had left the station, he signed a paper which he could not well read, and did not read, but which he supposed to be a receipt containing nothing inconsistent with the contract under which the stock were shipped. The company contended, and offered testimony to show, that the only contract made with the shipper was the written one embodied in the paper or bill of lading signed by the shipper, and which, to a great extent, limited the liability of the company for losses that might occur. *Held*, that the court was warranted in submitting to the jury the question of what constituted the contract of the parties, and also in defining what the common-law liability of the company was, in case they should find in favor of the theory of the shipper. *St. Louis & S. F. R. Co. v. Clark*, 55 Am. & Eng. R. Cas. 367, 48 Kan. 321, 29 Pac. Rep. 312.

## ILLINOIS RULE.

Where a contract limiting the liability of a common carrier for goods to be forwarded beyond its lines is contained in the bill of lading, which in its entirety constitutes both a receipt and a contract, the *onus* is on the carrier to show that such restriction of the common-law liability was assented to by the consignor, and such assent is a question of fact, and the mere receiving of the bill of lading without notice of the restriction therein contained not amounting to an assent thereto. *Chicago & N. W. Ry. Co. v. Simon*, 5 Am. & Eng. R. Cas., N. S., 80, 160 Ill. 648, 43 N. E. Rep. 596. See also, *Adams Express Co. v. Haynes*, 42 Ill. 89; *Adams Express Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *Anchor Line v. Dater*, 68 Ill. 369; *Merchants' Dispatch Transp. Co. v. Furthmann*, 149 Ill. 66, 61 Am. & Eng. R. Cas. 145; *Ill. Cent. R. Co. v. Frankenburg*, 54 Ill. 88, 5 Am. Rep. 92.

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## BALTIMORE &amp; O. S. W. RY. CO.

v.

BOARD OF COM'RS OF JACKSON COUNTY *et al.**(Supreme Court of Indiana, Dec. 11, 1900.)*

[58 N. E. 837.]

**Eminent Domain—Second Appropriation to Public Use.\***—The rule that land once appropriated to a public use by virtue of the power of eminent domain cannot be subjected to a second appropriation for such use, unless authorized by the legislature, applies only when the second public use necessarily supersedes or destroys the former.

**Same—Public Drains—Location on Railroad Right of Way—Jurisdiction of County Board—Collateral Attack.**—Under Burns' Rev. St. 1894, §§ 5655, 5656, 5658-5661, vesting the county board with jurisdiction to establish and construct public drains, and providing that the board shall appoint viewers to locate the proposed drain and apportion to each parcel of land a share of the work in proportion to the benefits resulting from the improvement, and authorizing the assessment of benefits and damages, the mere location of a portion of the route of the proposed drain over a railway company's right of way will not *ipso facto* divest the board of its jurisdiction over the subject-matter, and therefore render its final order void and open to collateral attack.

Appeal from circuit court, Jackson county; S. B. Voyles, Judge.

Action by the Baltimore & Ohio Southwestern Railway Company against the board of commissioners of the county of Jackson and others. From a judgment for defendants, plaintiff appeals. Affirmed.

McMullen & McMullen and O. H. Montgomery, for appellant.

D. A. Kochenour and Burrall & Branaman, for appellees.

Jordan, J. Appellant commenced this action to perpetually enjoin the board of commissioners of Jackson county, together with the county auditor and others, from constructing a public ditch along and upon its right of way. A trial  
*Case Stated.* was had upon the issues joined between the parties, and the court upon request made a special finding of facts, and stated its conclusions of law thereon adversely to the plaintiff, and over its exceptions to such conclusions, and also

\*As to whether the land of a railroad company may be taken by virtue of the right of eminent domain, see *Orleans & J. Ry. Co. v. Jefferson & L. P. Ry. Co.* (La.), 16 Am. & Eng. R. Cas., N. S., 699, and *foot-note*.

over its motion for a new trial, rendered judgment in favor of the defendants. From this judgment the appellant railroad company appeals, and alleges in its assignment of errors that the court erred in its conclusions of law, and in denying the motion for a new trial.

The following may be said to be a summary of the material facts alleged by appellant in its complaint filed in the lower court: The Baltimore & Ohio Southwestern Railway Company, plaintiff below and appellant herein, is a corporation organized under the laws of this state, and since the year 1894 it has been engaged in operating a railroad which extends from the city of Cincinnati, Ohio, to the city of St. Louis, Mo. This line runs through Jackson county, Ind. Its right of way through said county is 80 feet wide, being 40 feet in width on each side from the center of the track. At the December term, 1892, of the board of commissioners of said Jackson county, one Empsom, a resident landowner of that county, presented a petition to said board, praying therein for the establishment and construction of a public ditch in the vicinity of appellant's right of way under and in pursuance of an act of the legislature in force September 19, 1881 (sections 4285, 4286, Rev. St. 1881). The ditch, as contemplated by the petitioner, was to be 3 feet wide at its bottom, and was to have a slope of 6 inches to each vertical foot. Such proceedings were had before the board of commissioners that it was finally ordered by said board that the ditch be established and constructed. A part of said drain was ordered to be constructed longitudinally over plaintiff's right of way to the length of 8,400 feet, and on a line about 35 feet from the center of its railroad track, thereby appropriating a strip of plaintiff's land to the width of from 4 to 7 feet for the length above mentioned. It is averred that under such order of the board of commissioners the defendants are threatening to construct said ditch over and upon plaintiff's right of way, and, if said defendants are not enjoined from so doing, plaintiff will suffer irreparable damages. The complaint further avers that the defendants have no right, power, or authority to appropriate its said right of way for the purpose aforesaid—First, because no compensation or damages for such appropriation have been paid or tendered; second, because neither the board of commissioners nor any other court had any jurisdiction or power to order that the proposed ditch or drain be established and constructed longitudinally over plaintiff's right of way, and, so far as such order of the board attempts to do so, it is invalid and void, and, so far as the defendants are attempting to construct said ditch over the right of way in question, their acts are wrongful and illegal. The material facts embraced in the special finding of facts are substantially as follows: Plaintiff is a railroad corporation organized under the laws of this state, and is the owner of and engaged in operating a railroad which extends from the city of Cincin-

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nati, in the state of Ohio, into and through the states of Indiana and Illinois, on to the city of St. Louis, in the state of Missouri. The line of this road runs through Jackson county, Ind., and its right of way through this county is 80 feet wide. For many years previous to the appellant becoming the owner of this road, it was owned and operated by the Ohio & Mississippi Railway Company. In the year 1894 the latter company sold and transferred to the plaintiff all of its said road and rights thereto, including its right of way, and, by virtue of such sale and transfer, plaintiff succeeded to the ownership and control of said road, including the right of way in controversy. At the December term, 1892, of the board of commissioners of Jackson county, Ind., one Azariah Empsom, a resident landowner of said county, presented to said board his petition whereby he prayed that said board establish and cause to be constructed a public ditch or drain under the statutes of 1881, heretofore mentioned; said ditch to be located by beginning on the north side of a certain highway, 35 or 40 feet from the center of the track of the railroad then owned and operated by the predecessor of the plaintiff. Such proceedings seem to have been had before the board of commissioners in the matter of establishing said drain that the proper viewers were appointed by the board to view the route of the proposed ditch, locate and lay out the same, and award benefits and damages, as provided by the statute. The viewers made a favorable report to the board in respect to the public utility of the drain in controversy, marked its route or location, and awarded benefits and damages accruing by reason of its construction. Their report, as made to the board of commissioners and filed in the office of the county auditor, disclosed that the location of the ditch, as made, would be over and along the right of way of the aforesaid Ohio & Mississippi Railway Company, parallel with its railroad track, some 35 or 40 feet from said track, extending along said right of way to a distance of 8,400 feet into White river, the outlet of the ditch. After the filing of the report of said viewers, such steps and proceedings were taken and had by the proper authorities that notice was duly given to all persons who would be affected by the proposed ditch, including plaintiff's predecessor, then the owner of said road, of the pendency of said petition before the board, and of the time and place which had been fixed for the hearing thereof. The assessment of benefits made by the viewers, set forth in their report to the board of commissioners, among others, included an assessment of \$100 against the right of way of the aforesaid Ohio & Mississippi Railway Company, assessed by said viewers on the account of benefits to said right of way by reason of the construction of said ditch. After the giving of the required notice, such proceedings were had before the board of commissioners at its December term, 1893, upon the hearing of said petition at the time fixed, as resulted in the board adjudging that all parties affected by the proposed ditch



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had been duly notified, and thereupon said road made an order, and duly entered the same of record, to the effect that said ditch be established and constructed as designated or specified in the report of said viewers. Within the time allowed by law, Steele, whose lands were assessed with benefits, appealed from the said order of the board to the Jackson circuit court, wherein such proceedings were had as resulted in that court rendering a judgment sustaining and affirming said ditch proceedings, and the court ordered that said drain be established and constructed in all respects, as to the route, plan, and manner, as set forth and described in the report of the viewers heretofore mentioned. Steele appealed from said judgment to the supreme court of this state, wherein the judgment of the lower court was affirmed. *Steele v. Empsom*, 142 Ind. 397, 41 N. E. 822. It is further disclosed by the special finding that the auditor of Jackson county, in pursuance of the aforesaid order of the board and judgment of the Jackson circuit court, proceeded in the fore part of 1896 to let out, as provided by the statutes, the jobs or contracts for the construction of said ditch. Some of the defendants to whom such jobs had been let had commenced to dig and construct a part of the drain in dispute. The court finds that it is only the main track of appellant's road with which the drain runs parallel, and that the north edge thereof, if the drain is constructed, will not be within 20 feet of the south foot of the railroad fill, and that the construction of the ditch will not weaken the embankment which sustains the railroad track. The special finding also discloses that the line of the ditch is outside of appellant's fence, standing on its right of way, and is located south of the aforesaid embankment, in a depression which is of uneven depth, and into which water runs and stands for a time. Upon the facts so found the court stated its conclusions of law to the effect as follows: First, the plaintiff is bound by the proceedings to construct the ditch in controversy, and is bound by the places where it has been located; second, that the law is with the defendants, and that plaintiff ought to take nothing by its action.

The theory of the complaint, as outlined by the material facts therein alleged, seems to be to the effect that there was an entire absence of jurisdiction or power on the part of the board of commissioners of Jackson county to establish and cause to be constructed any portion of the particular ditch over and upon appellant's right of way. This lack of jurisdiction upon the part of the board is apparently the foundation of appellant's action. It is contended by its counsel that, by reason of the absence of the board's power in this respect, its order establishing a part of the drain longitudinally upon and over the right of way as shown by the special finding is null and void, and therefore open to an attack in this collateral action. The objections urged by appellant are not that the board of commissioners had no jurisdiction to order the

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establishing of a ditch, but its insistence is that the board, under the facts, had no authority to order the establishment of the particular ditch in controversy over and upon the right of way of the railroad company. The special finding discloses, as we have seen, that the Ohio & Mississippi Railway Company, appellant's predecessor, grantor and owner of the right of way in question at the time the drainage proceedings were instituted, was made a party thereto by being duly notified as required by the statute of the pendency of the petition therein, and of the time and place fixed for the hearing before the board. It therefore affirmatively appears that the board of commissioners of Jackson county had jurisdiction over the person of appellant's predecessor, from which, as shown, it subsequently acquired all of its title to the right of way in dispute. Appellant, therefore, must be deemed and held to be bound by the final order of the board under which the ditch was established in like manner and to the same extent as was its predecessor. Consequently, unless it is apparent that there was a lack of jurisdiction upon the part of the board of commissioners in respect to the subject-matter of the proceeding, which subject-matter was the establishment and construction of a public ditch, appellant, by virtue of a well-settled rule, must necessarily fail in this collateral attack, no matter how gross an error or irregularity was committed by the board in locating and establishing as it did the particular ditch over and upon the right of way in question. It can only succeed in this action by showing that the order of the board, so far as it is affected thereby, is null and void. Perkins v. Hayward, 132 Ind. 95, 31 N. E. 670; Gold v. Railway Co., 153 Ind. 232, 53 N. E. 285, and cases there cited. It is contended by appellant's learned counsel that the board

**Eminent Domain  
—Second Approp-  
riation to Pub-  
lic Use.**

possessed no power to locate any part of the ditch longitudinally upon its right of way, for the reason that when lands have been once taken by virtue of the power of eminent domain or otherwise, and appropriated to a public use, as is the right of way in controversy, such land cannot again be subjected to another public use unless such secondary appropriation be authorized by the legislature. The authorities, however, affirm that this rule only applies when such second public use, by reason of its nature or character, necessarily supersedes or destroys the former use. Gold v. Railway Co., 153 Ind. 232, 53 N. E. 285; Steele v. Empsom, 142 Ind. 397, 41 N. E. 822. In Gold v. Railway Co., supra, we had occasion to fully consider the application and enforcement of the rule for which appellant contends. This latter case was an action whereby the railroad company sought to enjoin the opening of a public highway over its yards and right of way. The highway in that case had been laid out and ordered to be opened in a proceeding instituted before the board of commissioners of Marion county for that purpose. The railroad company owning and con-

trolling the right of way, and the predecessor of the appellee in that case, had been made a party to such highway proceedings by due notification, but neglected to appear before the board and urge any objections to the proceeding so far as it affected its right of way. We held in that appeal that the railroad company was bound by the order of the board, and could not successfully assail it in that collateral action. In considering the principle in relation to the secondary appropriation of lands to a public use, we said in that case, on page 242, 153 Ind., and page 289, 53 N. E.: "We do not controvert the general rule asserted in the decisions of this court cited by appellee, to the effect that where land is once appropriated, by virtue of the doctrine of eminent domain, to an important public use, it cannot again be devoted to another public use wholly inconsistent with the former, and which, under the circumstances of the particular case, must necessarily supersede or destroy such former use, unless it is shown that the right to subject the land to the second appropriation or use is authorized by an act of the legislature, either expressly or by necessary implication. That this rule is applicable, when properly invoked, to prevent the location and construction of streets or other public highways over and along the land and tracks of a railroad company, when such location and construction would necessarily supersede or be destructive of the necessary use of such land or tracks of the company in the operation of its railroad, is well affirmed by the authorities. [Citing authorities.] That the jurisdiction of the board of commissioners over the subject-matter in a proceeding, under the statute, to locate or change a public highway, is not devested by reason of the fact that such proposed location or change will appropriate to the use of such highway any part of the right of way of a railroad company, is recognized by the decisions of this court. *Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329. In this latter case it is said that the railroad company, when its property is so appropriated, must be paid, the same as any other person, and that such compensation, in the very nature of things, becomes an element to be considered in determining the question of the public utility of such highway. The question, as stated by Judge Frazier, is, 'Will it cost the public more than it will be worth?'" The holding in that case in respect to the application and force of the rule in controversy must exert a controlling influence over the decisions of the question in the case at bar. Jurisdiction over the establishment of the particular proposed public drain under the proceedings instituted was by the statute lodged in the board of commissioners of the county of Jackson. Vide sections 5655, 5656, *Burns' Rev. St.* 1894; *Cauldwell v. Curry*, 93 Ind. 363. The filing of the petition provided by section 5656 invokes the jurisdiction of the board. After such jurisdiction has been once acquired, mere errors or irregularities in the proceeding and order of the board will not, as we have

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previously seen, justify a collateral attack upon the part of a person aggrieved thereby, who was a party to such proceeding. The remedy is by appeal to the circuit court under the provisions of section 5671, Burns' Rev. St. 1894. Even though the order could be said to be void by reason of an absence of a jurisdiction over the subject-matter, still an aggrieved party may appeal from such void order to the circuit court, and therein secure adequate relief. *Railway Co. v. Lockridge*, 93 Ind. 191; *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124.

It is true that the drainage statute in question does not expressly provide that the route of a contemplated drain may be over the land or right of way of a railroad company. By section 5656 it is provided that the petition shall set forth a general description of the beginning and terminus of the ditch. Section 5659 authorizes the viewers, if they deem it best, to vary from the route or line described in the petition, provided they begin the ditch or drain at the point described, and follow the described line or route as near as practicable. Under the provisions of section 5661, the viewers are authorized to establish the route of the ditch in the event they find that the one proposed in the petition is not such as to best effect the object sought by the construction of the drain. This latter section further provides that, in all cases in which the route proposed is along highways already established, the viewers shall then locate the ditch at a sufficient distance from the center of such highways to admit of a good road along such central line. The viewers, under this section, in viewing the line of the drain, are not permitted to materially depart from the terminal points described in the petition. By section 5656 the viewers are empowered to apportion to each parcel of land, and to each corporate road or railroad, a share of the proposed work in proportion to the benefits which will result to each by reason of the improvement. Section 5658 provides for the assessment of benefits upon all lands benefited by the ditch, and section 5660 provides for the assessment of damages sustained by any person by reason of the construction of the ditch. Section 5665 authorizes any person interested in the location of the proposed work to appear before the board of commissioners at or before the time fixed for hearing the petition, and file a remonstrance against the ditch, as located by the viewers, on and across his lands, by setting forth in such remonstrance his grievance; and any person deeming his assessment of benefits too high, or the damages allowed him too low, may also remonstrate for such reasons. An examination of the statute discloses that it is quite broad and comprehensive in its terms and provisions, and it is evident, in our opinion, that the legislature intended to confer upon the proper boards of commissioners plenary power or jurisdiction in the establishment and construction of a public ditch as therein provided.

Same—Public  
Drains—Location  
on Railroad  
Right of Way  
—Jurisdiction  
of County Board  
—Collateral  
Attack.

Therefore, under the general power so conferred, when the board has once obtained jurisdiction over the subject-matter and the persons to be affected by the proposed work, by the method of procedure prescribed by the state, it must necessarily be considered as being invested with the power, in the first instance, to decide all questions or matters which may properly arise in the course of the proceedings leading up to and including its final order; and such decision or order, whether right or wrong, must be deemed to be binding upon all persons who are properly made parties to such proceedings, until vacated by an appeal to the circuit court. It certainly cannot be asserted that under any and all circumstances, conditions, and state of facts in a proceeding to establish a public ditch in pursuance of this drainage statute, the location of a portion of the route of the proposed drain, longitudinally or otherwise, over and upon the lands or right of way of a railroad company, will ipso facto oust or devert the board of its jurisdiction over the subject-matter, and therefore render its final order in the premises void. We think it may reasonably be presumed from the very nature and use of a public ditch that, if of ordinary dimensions, it may be constructed and maintained over and upon the right of way of a railroad company, if located sufficiently distant from the roadbed, without destroying or even impairing such right of way. In fact, under section 5656, supra, authority is given to the viewers, when they find it necessary, to provide for what is commonly denominated a "blind ditch," by running the proposed drain underneath the ground, through tile. It appears that the ditch in question was located quite a distance in feet from the bed of the railroad track, and a part of the drain, at least, ran through a sag or depression in the ground on appellant's right of way, in which depression water "at times would stand." The railroad company, instead of being damaged or deprived of the use of its right of way by reason of the location of the ditch, was benefited thereby, as benefits to the amount of \$100 were assessed against it. It is true that, if it should appear to the board of commissioners in the particular case that the location and establishment of a public drain over and upon the right of way of a railroad company would necessarily result in superseding or destroying the use to which such right of way was appropriated, it would, under such circumstances, be wrong and an abuse of power upon the part of the board of commissioners to subject the right of way to the location and use of the proposed drain. But certainly it could not be asserted, under the broad provisions of the drainage statute referred to, that such a wrong or abuse of power on the board's part would constitute a jurisdictional defect in its final order establishing the work, and thereby render such order void and open to collateral attack. The determination of the question as to what would be the result of appropriating a portion of the right of way to the use of the ditch proposed would surely

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be a matter, under the law, to be determined from the facts by the board at the hearing of the petition and report of the viewers; and a railroad company aggrieved by the action or decision of the board upon that question could appeal for relief from the final order to the proper circuit court, and from the judgment of the latter court, if it desired, to the supreme court of this state.

In the case of *Steele v. Empsom*, 142 Ind. 397, 41 N. E. 822, the appellant therein was a remonstrator in the identical drainage proceedings out of which the case at bar arises. She appealed from the order of the board to the Jackson circuit court, and from the judgment of that court to this court. It was contended by appellant in that appeal that under the rule urged by counsel for appellant in this case the board of commissioners had no power or authority to establish and locate the ditch over the right of way now involved. This court, in answering the contention of the appellant in that appeal, on page 406, 142 Ind., and page 825, 41 N. E., said: "The rule urged by appellant only applies when the second public use would naturally injure or destroy the use for which such right of way was employed, and when the same could not exist without impairing the first uses. [Citing authorities.] It is not claimed, nor does the evidence show, that the location of the drain upon the right of way would in any way interfere with the use of the railroad company. On the contrary, it was found by the viewers, reviewers, jury, and adjudged by the lower court, that the same would be a benefit to said right of way. The railway company named was a party to the proceeding, and assessed with benefits, and raised no objection to such location or assessment. \* \* \* The railroad company, having been a party to the proceedings, and having raised no objection to the same, cannot successfully assail such location of the ditch, even if erroneously made. *Perkins v. Hayward*, supra." Appellants' predecessor was afforded an opportunity to appear before the board at the time of the hearing of the petition and consideration of the report of the viewers, and urge, under a remonstrance, its objection to the location of the ditch over and upon its right of way; and in the event of an adverse decision an adequate remedy, as previously shown, was provided by an appeal from the final order of the board to the Jackson circuit court. It neglected in any manner to contest the proceedings before the board, and both it and appellant seem to have delayed until after the contracts for the construction of the drain had been let, and the construction thereof had commenced, before this action to enjoin was instituted. Under no view of the case can it be asserted that the complainant herein has exercised any great degree of diligence. Counsel for appellant, in support of their contention that the order of the board was void for the reason that it had no jurisdiction or power to declare the proposed drain established upon appellant's right of way, refer to the case

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of Railroad Co. v. North, 103 Ind. 486, 3 N. E. 144. That was an action to enjoin the construction of a public ditch, a portion of which, under the order of the Marshall circuit court, had been located over and upon the railroad company's right of way. It may be conceded that the decision in that appeal fairly sustains appellant's contention. That case, however, in respect to the point raised by appellant herein, has been criticised as unsound (and properly so, we think) by a prominent text writer. Van Fleet, Coll. Attack, § 142. The holding in the North Case may be said to be incompatible with the decision of this court in Gold v. Railway Co., 153 Ind. 232, 53 N. E. 285. The learned judge who prepared the opinion in the North Case seems, after a hasty consideration, to have reached the conclusion that, by reason of the mere fact that a portion of the proposed ditch was located over and upon the railroad company's right of way, the circuit court, which, under the statute, had been given jurisdiction over the subject-matter of the proceeding, to construct the ditch, was thereby divested of such jurisdiction, and that its judgment in declaring the proposed ditch established was not erroneous only, but actually and absolutely void. We are unwilling to accept or be bound by the broad doctrine asserted in that case, and, so far as the decision therein conflicts with our holding in the case at bar, it must be deemed to be overruled. In the appeal of State v. Town of Vernon, 25 Vt. 244, a public highway had been established by the proper county court and ordered to be opened, in part, upon the right of way or grounds of a railroad company. The town of Vernon was a party to the proceedings before the county court. In a criminal prosecution against said town for its failure to open the highway as ordered by the county court, the town sought to justify its failure upon the ground that the highway had been laid out in part upon the right of way or grounds of the railroad company. The supreme court of Vermont in that appeal, however, held that the town was bound by the judgment of the county court, and that it could not repudiate the effects of such judgment in a collateral manner.

The special finding of facts in the case at bar supports the court's conclusion thereon, and the evidence fairly sustains the special finding. It therefore follows that the trial court did not err in its conclusions of law, or in denying appellant's motion for a new trial. The judgment is therefore affirmed.

## SUTTON

v.

## CHICAGO &amp; N. W. RY. CO.

(Supreme Court of South Dakota, Dec. 5, 1900.)

[84 N. W. 396.]

**Connecting Carriers—Loss in Shipment—Initial Carrier's Liability beyond Its Line.\***—Comp. Laws, § 3905, provides that, if a common carrier accepts freight for a place beyond his line, unless he stipulates otherwise, he must deliver it at the end of his line to some other competent carrier, and that his liability shall cease on making such delivery. *Held*, that an instruction in an action for a loss in shipment, which imposed on the receiving carrier a continued liability beyond his own line, and covering the negligence of the connecting carrier, was erroneous, since under the statute the liability of the receiving carrier ceased on delivery of the goods to the connecting carrier.

**Through Contract—Authority of Local Agent.†**—Where plaintiff, in an action against a carrier for a loss sustained in shipment, did not claim that a through contract was entered into, the question whether the amount collected by defendant's local agent to apply on prepayment of freight charges was sufficient to cover the entire amount collectible, including the charges of connecting lines, was immaterial, since a local agent, as such, has no authority to contract for shipments over connecting lines, and none can be inferred from the fact that he collected freight for the entire distance.

Appeal from circuit court, Potter county; Loring E. Gaffy, Judge.

Action by William Sutton against the Chicago & Northwestern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Coe I. Crawford, for appellant.

A. L. Ellis and Albert Gunderson, for respondent.

Fuller, P. J. Plaintiff obtained judgment in this action to recover \$375, damages sustained, it is claimed, by the loss of

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\*As to whether initial carrier may limit its liability to its own line, see *Keller v. Baltimore & O. R. Co.* (Pa.), 19 Am. & Eng. R. Cas., N. S., 197, and *foot-note*.

As to whether the initial carrier is liable for loss or damage occurring beyond its own line, see *Cincinnati, etc., Ry. Co. v. N. K. Fairbanks & Co.* (C. C. A.), 13 Am. & Eng. R. Cas., N. S., 179, and *extensive note*, 187 *et seq.*

†See notes at end of case.



a car load of potatoes delivered to the defendant at Gettysburg, and negligently permitted to freeze while in transit, and the defendant appeals. Respondent loaded the potatoes into one of appellant's refrigerator cars on the 17th day of February, 1898, and the bill of lading recites that, at the owner's risk of freezing, the shipment is made from the consignor, at Gettysburg, to the consignee, at St. Louis, Mo., and the receipt of \$130.10 to apply on freight is therein acknowledged. It appears from the contract, and the evidence shows, that appellant's line of railway extends from Gettysburg, in the direction of St. Louis, no further than Sterling, Ill., and that the car was to be taken from that junctional point by the Chicago, Burlington & Quincy Railroad Company to its destination at St. Louis. It appears from the testimony that the car was promptly delivered to the connecting carrier at Sterling, and, in the absence of a stipulation to the contrary, it is urged by counsel for appellant that all liability of his client ceased at that point. While this was the theory of the defense, and no direct evidence was offered to show even the existence of a joint traffic arrangement between the two companies, the court, by modifying one of the written instructions proposed by appellant, without marking the same either "Given" or "Refused," as required by section 5048 of the Compiled Laws, charged the jury, in substance, that, in the absence of an express agreement as to liability, it was appellant's duty to safely convey the property to St. Louis, and that until the same was delivered at that point its liability as a common carrier continued in full force and effect.

With reference to proposed instructions which he cannot give, the mandate of the above-cited statute to the trial court is that "he shall write on the margin thereof the word 'Refused,' \* \* \* and all instructions asked for by counsel shall be given or refused by the judge, without modification or change, unless such modification or change be consented to by the counsel asking the same." *Galloway v. McLean*, 2 Dak. 372, 9 N. W. 98. But for the modification made by the court without counsel's consent, and on account of which an exception was taken, the jury would have been advised by the proposed instruction that, "in the absence of any express agreement between plaintiff and defendant in relation to the liability of the defendant, it would be the duty of the defendant to convey the property in question, with safety and dispatch, from Gettysburg, where it received it from the shipper, to the junction point at Sterling, Ill., and there deliver it to the connecting line, the Chicago, Burlington & Quincy Railroad Company, for transportation to its destination, at St. Louis. Its responsibility as a common carrier would begin when the shipper had loaded the car and completely delivered the same to it for conveyance, and would end when it had delivered the car to such connecting carrier at Sterling, Ill." Considered in the light of the record presented on appeal, this

## Notes

instruction correctly states the law governing the case, and the modification thereof, imposing a continued liability upon appellant beyond its own line; and covering the negligence of the next carrier all the way to St. Louis, is at variance with the following statutory provision: "If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier, carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery." Comp. Laws, § 3905. No claim is made that a through contract was entered into, and a local agent, as such, has no power to contract for the shipment of property over connecting lines of railway, nor will authority to do so be inferred from the fact that he collected freight for the entire distance. Page v. Railway Co., 7 S. D. 297, 64 N. W. 137; Coates v. Railway Co., 8 S. D. 173, 65 N. W. 1067. It therefore becomes unnecessary to determine whether the money collected by the agent at Gettysburg "to apply on prepayment of charges on freight" was sufficient to cover the entire amount collectible, and the conclusion follows that the liability of appellant, according to the statute, continued only until the car was delivered at Sterling, Ill., to the connecting line. Although this statute and our decisions are controlling, we cite a few of the cases, as follows: Wehmann v. Railway Co. (Minn.) 59 N. W. 546; Hoffman v. Railway Co. (Kan. App.) 56 Pac. 331; Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. 318, 21 L. Ed. 297; Hewett v. Railway Co., 63 Iowa, 611, 19 N. W. 790; McConnell v. Railway Co. (Va.) 9 S. E. 1006. Appellant being liable only to the extent of its own route and for safe delivery to the connecting line, the instruction complained of, whether given by the court upon its own motion or as coming from appellant, as claimed by its counsel, constitutes reversible error, and it is needless to consider other points relied on by counsel in his brief. The judgment is reversed, and the cause remanded for a new trial.

## NOTES.

**Authority of Local Agent to Make Contract to Carry Goods beyond Carrier's Line.**—In the absence of express authority to a local agent, or authority implied from a previous course of dealings, a railroad company is not bound by a contract of such an agent agreeing to ship goods beyond the end of his line. Burroughs v. Norwich & W. R. Co., 100 Mass. 28; Wiggins Ferry Co. v. Chicago, etc., R. Co., 73 Mo. 389, 5 Am. & Eng. R. Cas. 1, 39 Am. Rep. 519; Moore v. Henry, 18 Mo. App. 35; Patterson v. Kansas City, Ft. S. & M. R. Co., 47 Mo. App. 570; Cronch v. Louisville & N. R. Co., 42 Mo. App. 248; Turner v. St. Louis & S. F. R. Co., 20 Mo. App. 632; Grover v. Baker Sewing-Mach. Co. v. Missouri Pac. Ry. Co., 70 Mo. 672, 35 Am. Rep. 444; Wait v. Albany & S. R. Co., 5 Lans. (N. Y.) 475.

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But where the shipper is not chargeable with notice that the local station agent has been instructed by the carrier not to make contracts for transportation over connecting lines, and the agent has been making such contracts in behalf of the carrier for about six months, the agent may enter into such a contract with the shipper which will be binding on the railroad company. *Gulf, C. & S. F. Ry. Co. v. Cole*, 8 Tex. Civ. App. 635, 28 S. W. Rep. 391; *White v. Missouri Pac. R. Co.*, 19 Mo. App. 400. See also, *Grover v. Baker Sewing-Mach. Co. v. Missouri Pac. Ry. Co.*, 70 Mo. 672, 35 Am. Rep. 444.

And where the freight agent of a railroad has full authority to make arrangements as to the time and place of the delivery of freights, an agreement by him to ship by a line of boats binds the railroad company. *Michigan S. & N. I. R. Co. v. Day*, 20 Ill. 375.

**Authority of Agent Employed to Solicit Passengers to Receive Freight from Connecting Line.**—An agent employed for the sole purpose of soliciting passengers to patronize the road, and who is not held out by the company as their agent for any other purpose, has no power to bind the company by a contract to receive freight from another road and transport it to the depot of, and ship it on, the road for which he is such agent. *Taylor v. Chicago & N. W. R. Co.*, 74 Ill. 86.

**Authority of Station Foreman of Freight Department—Question for Jury.**—Where the only evidence of the contract to carry was that the foreman of the freight department at one of the defendants' stations agreed to have certain trees forwarded to a station not on the defendants' line, but on one connecting therewith—*held*, that this was evidence to be submitted to a jury of a contract to that effect binding the defendants, and that a nonsuit was wrong. *McGill v. Grand Trunk R. Co.*, 19 Ont. App. 245.

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EAST TENNESSEE, VIRGINIA, & GEORGIA RAILWAY COMPANY  
*et al.*, Appts.,

v.

## INTERSTATE COMMERCE COMMISSION.

[21 Sup. Ct. Rep. 516.]

*(Argued February 26, 27, 1900. Decided April 8, 1901.)*

**Interstate Commerce—Long and Short Hauls—Discrimination—Right of Carriers to Consider Facts Not Found by Commission.\***—Competition which is actual and substantial in its effect upon rates, if resulting from the action of other carriers who are subject to the Act to Regulate Commerce, may produce the dissimilarity of circumstances and conditions provided in § 4 of the act, so as to enable a carrier in adjusting rates to take into view such competition without the previous assent of the Interstate Commerce Commission.

**Same—Same—Discrimination—Competition.\***—The discrimination in favor of competitive points on account of competition which compels

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\*The authorities on these questions, will be found collected in the opinion.

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a reduction of rates to those points below the rates charged for shorter distances is not an undue or unjust discrimination prohibited by the Act to Regulate Commerce, § 3.

**Reviewing Acts of Commission.**—On application to the courts to enforce an order of the Interstate Commerce Commission which is based on an erroneous construction of the statute, by reason of which error it has declined adequately to find the facts, the courts will not proceed to an original investigation of the facts which should have been passed upon by the Commission, but will correct the error of law committed by that body, and, after doing so, dismiss the application without prejudice to the right of the Commission to make a further investigation of the facts.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit to review a decision affirming a decree sustaining an order of the Interstate Commerce Commission. Reversed.

See same case below, 39 C. C. A. 413, 97 Fed. Rep. 52.

Statement by Mr. Justice White:

The Board of Trade of Chattanooga, Tennessee, a chartered corporation, petitioned the Interstate Commerce Commission for relief under the Act to Regulate Commerce. The

**Case Stated.** defendants, the East Tennessee, Virginia, & Georgia Railway, and numerous other rail and steamship companies, were alleged to be common carriers subject to the Act to Regulate Commerce, and engaged in the transportation of passengers and freight by all rail, or partly by rail and water, from Boston, New York, Philadelphia, Baltimore, and other places on the eastern seaboard to Chattanooga, Nashville, and Memphis, in the state of Tennessee.

It was alleged that the defendant conveyed freight from the eastern seaboard, through and beyond Chattanooga, to the cities of Nashville and Memphis for a lesser rate to such long-distance points than was charged by them for like freight to Chattanooga, the shorter distance. This, it was averred, was a violation of § 4 of the act, prohibiting a greater charge for the shorter than for the longer haul, under substantially similar circumstances and conditions. And the disregard of the statute in the particular just stated, it was asserted, necessarily gave rise to violations of other provisions of the Act to Regulate Commerce; viz., of § 1, which forbids unjust and unreasonable charges, and of § 3, making unlawful the giving of undue or unreasonable preferences.

It is unnecessary to consider the complaint of the lesser charge to Memphis, the longer, than to Chattanooga, the shorter, distance, since this grievance was in effect held by the Commission to be without substantial merit; and its conclusion on this subject was not reviewed by either of the courts below, and it is not now seriously, if at all, questioned. After hearing, the Commission made elabo-

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rate findings of fact, and stated the legal conclusions which were deduced therefrom. 5 I. C. C. Rep. 546, 4 Inters. Com. Rep. 213. An order was made forbidding the defendant carriers from charging a greater compensation for the transportation for the shorter distance to Chattanooga than was demanded to Nashville, the longer distance. The execution, however, of this order, was suspended until a date named, so that the carriers might have opportunity to apply to the Commission to be relieved from the operation of the order. No application to be exempted having been made, and the carriers not having conformed to the behests of the Commission, this proceeding to compel obedience was commenced in the circuit court. In that court additional testimony was taken, but it was all merely cumulative of that which had been adduced before the Commission. The circuit court (85 Fed. Rep. 107), whilst not approving the reasoning by which the Commission had sustained the order by it entered, nevertheless on other grounds affirmed the command of the Commission. The circuit court of appeals for the sixth circuit, to which the case was taken, whilst it held that the Commission had misapplied the law, and although it did not approve of the reasoning given by the circuit court for its decree, nevertheless affirmed the action of that court. 39 C. C. A. 413, 99 Fed. Rep. 52.

Mr. Ed. Baxter for appellants.

Messrs. L. A. Shaver and James E. Boyd for appellee.

Mr. Justice White, after making the foregoing statement of the case, delivered the opinion of the court:

To comprehend the contentions which are made on this record it is essential to give a summary of the condition as depicted in the findings of the Commission, and upon which the relief which it granted was based.

The state of affairs was as follows: Freight from the eastern seaboard to Cincinnati and other western points north of the Ohio river was controlled by the classification and tariff of rates prevailing in what was denominated as the northern or trunk line territory. On the other hand, the area south of the Ohio river, which was denominated the southern territory, was governed by the classification and tariff of rates prevailing in that territory; such classification and tariff giving rise in most instances to a higher charge than that which prevailed in the northern territory. This general difference between the rates in the northern and those in the southern territory the Commission found arose from inherent causes, and, although they might in some aspects disadvantageously influence traffic in the southern territory, were yet the result of such essentially normal conditions as to give rise to no just cause of complaint. On this subject the Commission said:

"There may be some disadvantage to Chattanooga from this

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circumstance, since an article of a given class under the first-named system may be in a lower class under the other system, but the injury, if any, resulting from differences of that character is not believed to be serious.

"The general range of rates in the territory covered by the Southern Railway & Steamship Association is materially higher than in the territory of the Trunk Line Association, the difference resulting mainly from the much greater volume of traffic in the latter section; and it is inevitable that difficulties should exist and complaints arise along the line of division between varying systems of classification and unlike methods of traffic construction."

The grievance alleged arose in this wise: Where freight destined to a point in the southern territory, instead of being sent by the southern routes, was shipped from the eastern seaboard by the northern or trunk line, via Cincinnati or other trunk-line points north of the Ohio river, it would be classified and charged for according to the northern trunk-line rates. But such freight thus shipped through the trunk line or northern route, bound for Chattanooga or other southern points, on leaving Cincinnati and on entering the southern area for the purpose of completing the transit, became subject to the southern classification and rates. Thus, irrespective of the mere form, and considering the substance of things, the charge on freight shipped in this way was made according to the northern classification and rate for the transportation in the northern territory to points on the Ohio river, plus the southern classification and rates from those points to the place in the southern territory to which the freight was ultimately destined, this being equivalent to the rate which the merchandise would have borne had it been shipped so as to subject it wholly to the southern territory rates.

This was, however, not universally the case. The single exception (eliminating Memphis from view) was this: The Louisville & Nashville Railroad, operating from Cincinnati to Nashville, instead of causing the merchandise shipped from the eastern seaboard through Cincinnati to Nashville to bear the southern territory classification and rate from Cincinnati to Nashville, submitted the traffic between Cincinnati and Nashville to the northern, instead of to the southern, territory rates. It hence followed that merchandise shipped from the eastern seaboard to Nashville through the northern territory bore a less charge than it would have borne if shipped to Nashville through the southern territory.

To compete with the Louisville & Nashville Railroad for Nashville traffic, the carriers in the southern territory fixed their rate to Nashville so as to make it as low as that charged to that point by the Louisville & Nashville Railroad. It hence came to pass that freight shipped from the eastern seaboard to Chattanooga paid the southern rate, whilst freight shipped to Nashville, although it passed through Chattanooga, went on

to Nashville at the lower rate there prevailing, which lower rate was caused by the action of the Louisville & Nashville Railroad in exceptionally reducing its charge to Nashville. We say, by the action of the Louisville & Nashville Railroad, because the findings of the Commission expressly establish that the exceptional rate to Nashville, which was established by the Louisville & Nashville Railroad, was not caused by water competition at Nashville, but was exclusively the result of the action of the Louisville & Nashville Railroad in exceptionally charging a lower rate to Nashville different from that which it demanded for traffic to other points through the southern territory. That the other carriers through the southern territory, including those operating from Chattanooga to Nashville, were, in consequence of this condition at Nashville, compelled either to adjust their rates to Nashville to meet the competition or abandon all freight traffic to Nashville, was found by the Commission to be beyond dispute. On both these subjects the Commission said:

"There might, of course, be such an advance in rail rates that shipments from the east would take the water route from Cincinnati. What amount of difference would produce that result it is impossible to determine from the testimony; but we find that such difference might be substantially greater than it is at present without important effect upon the railroad tonnage from the east, and that the through rate to Nashville is in no sense controlled by water competition at that point, either actually encountered or seriously apprehended.

"The lower rates accepted by the carriers engaged in the transportation of eastern merchandise to Nashville via Chattanooga are not forced upon them by any water competition at the former place. In performing this service for the compensation fixed by the present tariffs, these carriers are not affected by the circumstance that water communication exists between Cincinnati and Nashville. The Nashville rate is independent of the lines operating through Chattanooga, and those lines have no voice in determining its amount. That rate is made by the all-rail carriers via Cincinnati, and their action is uncontrolled by the defendant lines. The competition which the latter meet at Nashville is distinctly the competition of the trunk lines and the Louisville & Nashville system, whose northern termini are at points on the Ohio river which receive trunk-line rates on eastern shipments. The competitors of the defendants for this Nashville traffic, therefore, are the railroads from the Atlantic seaboard reaching Nashville by way of Cincinnati, etc., all of which are interstate carriers subject to the Act to Regulate Commerce. These carriers established rates and united in joint tariffs from eastern points to Nashville long before the lines through Chattanooga engaged in the Nashville business. The acceptance of the rates so fixed by the rail lines via Cincinnati was

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the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic."

Although the Commission thus found that the competitive conditions at Nashville rendered it absolutely necessary for the other roads to adjust their charges so as to meet the competition if they wished to engage in freight traffic to Nashville, it nevertheless held that the carriers had no lawful right to consider the competition at Nashville in adjusting their rates to that place. This was predicated solely upon the fact that the competition existing at

**Interstate Commerce—Long and Short Hauls—Discrimination—Right of Carriers to Consider Facts Not Found by Commission.**

Nashville was caused by carriers who were subject to the Act to Regulate Commerce, and, under the view which the Commission entertained of the law to regulate commerce, competition of that character could not be availed of by a carrier as establishing substantially dissimilar circumstances and conditions without a prior application by the carrier to the Commission for the purpose of obtaining its sanction to taking such competitive conditions into consideration for the purpose of fixing rates to the competitive point. The commission, in support of this construction of the statute, referred to a previous opinion by it announced in the case of Trammell v. Clyde S. S. Co., 5 I. C. C. Rep. 324, 4 Inters. Com. Rep. 120. The proposition decided in the case cited, which it was held governed the case at bar, was thus stated:

"The carrier has the right to judge in the first instance whether it is justified in making the greater charge for the shorter distance under the 4th section in all cases where the circumstances and conditions arise wholly upon its own line or through competition for the same traffic with carriers not subject to regulation under the Act to Regulate Commerce. In other cases under the 4th section the circumstances and conditions are not presumptively dissimilar, and carriers must not charge less for the longer distance except upon the order of this commission.'"

Applying this proposition, the Commission said:

"We must hold that the lower rates accorded by the defendants on shipments to Nashville are without warrant of law, and that the higher charges exacted on shipments to Chattanooga cannot be sanctioned in this proceeding."

The order entered by the Commission was confined solely to the greater charge to Chattanooga, the shorter, than to Nashville, the longer, distance. Omitting mere recitals, it was adjudged that certain named defendants, "or such of them as are or may be engaged in the transportation of property from New York and other Atlantic seaboard points to Chattanooga or through Chattanooga to Nashville, in the state of Tennessee, be and they severally are hereby required to cease and desist from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property



from New York, Boston, Philadelphia, Baltimore, or other Atlantic seaboard cities for the shorter distance to Chattanooga than for the longer distance over the the same line in the same direction to Nashville. That for the purpose of enabling said defendants to apply to the Commission for relief under the proviso clause of the 4th section of the Act to Regulate Commerce, this order is hereby suspended until the 1st day of February, 1893; but the same will take effect and be in force from and after that date unless such application be made prior thereto. In case such relief shall be applied for within the time mentioned the question of further suspending this order until the hearing and determination of such application will be duly considered."

The record makes it clear that in allowing this order the Commission thought that its literal enforcement would bring about injustice, and therefore that the order was entered solely because it was deemed that the technical requirements of the statute must be complied with. It is also patent from the reasons given by the Commission for allowing the order, that the Commission refrained from considering or passing on any other question arising, either expressly or by implication, from the complaint, such as the reasonableness per se of the rates in controversy or the discrimination which might be produced by them. And it also obviously appears that the examination of the issues was thus confined solely to the alleged violation of the long and short haul clause, because it was deemed that all questions as to reasonableness of rates per se or discrimination arising therefrom could more properly be considered by the Commission when application was made by the carriers to be relieved from the restraints of the long and short haul clause within the time and in accordance with the permission granted by the order which was rendered. The Commission on these subjects said:

"In justice to the various parties in interest, however, it should be added that this disposition of the case is not intended to preclude the defendants from applying to the Commission for relief from the restrictions imposed by the 4th section of the act, on the ground that the situation in which they are placed with reference to this Nashville traffic constitutes one of the 'special cases' to which the proviso clause of that section should be applied.

"It is stated in the foregoing findings that the present Nashville rate is prescribed by the rail lines reaching that point via Cincinnati, and that the defendant lines through Chattanooga have no voice or influence in determining its amount. These lines are under compulsion, therefore, to meet the rates which other carriers have established, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals, or abandon the large percentage of Nashville business which they now secure. In addition to

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this, the geographical position of these two cities, the diverse character and divergent courses of the several groups of lines which connect them with the Atlantic seaboard, the varying systems of classifications by which they are severally affected, and the greater volume of traffic at the lower rates prevailing in the trunk line territory, are existing conditions which govern, to some degree at least, the transportation in question. For those conditions the carriers complained of do not appear chiefly responsible, because the lower rate to Nashville is beyond their control, and the allowance of the same rate to the shorter-distance point might reduce their revenues below the limits of fair compensation. Without in any sense prejudging the case, we hold that the defendants may invoke its consideration in an appropriate proceeding.

"Any such intimation, however, should not be understood as covering an implied indorsement of the present disparity in rates as between Chattanooga and Nashville, for no such inference is intended. The suggestion here made goes no further than the propriety of an unprejudiced investigation when permission to deviate from the general rule of the statute is applied for by these carriers on account of the special circumstances by which they are surrounded. It seems improbable that the discrimination complained of can be made less oppressive by any increase in the Nashville rate, and on that assumption the only practical relief is a reduction in rates to Chattanooga. We are aware of the difficulties attending a readjustment upon that basis, but we cannot regard them insuperable.

"We entertain little doubt, therefore, that equity between shipper and carrier requires some reduction in the rates now enforced on Chattanooga traffic from Atlantic points, and are convinced of the necessity for such a reduction to secure relative justice between that town and Nashville. We refrain from further statement of the reasons which have induced this conclusion, as the amount to which the Chattanooga rate should be reduced will not now be decided. If the carriers engaged in Nashville transportation through Chattanooga act upon the suggestion above made, and apply for relief from the restrictive rule laid down in the 4th section, the subject can be more fully considered in disposing of that application."

After reciting the fact that the case had been on both sides presented to the Commission under the assumption that the rights of the parties could be adequately adjusted by determining only the controversy arising from the long and short haul clause of the act, the Commission added:

"The question which may arise if permission is sought to depart from the general rule relating to long and short hauls was not specially discussed. On this ground, also, it would seem suitable to allow opportunity for a further hearing before fixing maximum rates on shipments to Chattanooga."

Taking into view the terms of the order and the reasons given by the Commission for considering only one aspect of the controversy and excluding all others, it is obvious that that body construed the Act to Regulate Commerce as meaning that, however controlling competition might be on rates to any given place, if it arose from the action of one or more carriers who were subject to the law to regulate the commerce, the dissimilarity of circumstance and condition provided in the 4th section could not be produced by such competition unless the previous assent of the Commission was given to the taking by the carrier of such competition into view in fixing rates to the competitive point. This in effect was to say that the dissimilarity of circumstance and condition prescribed in the law was not the criterion by which to determine the right of a carrier to charge a lesser rate for the longer than for the shorter distance, unless the assent of the Commission was asked and given. This in substance but decided that the dissimilarity of circumstances and conditions prescribed in the law was not the rule by which to determine the right of a carrier to charge a lesser rate for the longer than for the shorter distance, but that such right solely sprang from the assent of the Commission. In other words, that the dissimilarity of circumstances and conditions became a factor only in consequence of an act of grace or of a discretion flowing from or exercised by the Commission. This logical result of the construction of the statute adopted by the Commission was well illustrated by the facts found by it and to which the theory announced was in this case applied. Thus, although the Commission found as a fact that the competition at Nashville was of such a preponderating nature that the carriers must either continue to charge a lesser rate for a longer haul to Nashville than was asked for the shorter haul to Chattanooga, or abandon all Nashville traffic, nevertheless they were forbidden to make the lesser charge for the longer haul. In other words, they were ordered to desist from all Nashville traffic unless they applied to the Commission for the privilege of continuing such traffic by obtaining its assent to meet the dominant rate prevailing at Nashville. But since the ruling of the Commission was made in this case, it has been settled by this court that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that where this condition exists a carrier has a right of his own motion to take it into view in fixing rates to the competitive point. That is to say, that the dissimilarity of circumstance and condition pointed out by the statute, which relieves from the long and short haul clause, arises from the command of the statute, and not from the assent of the Commission; the law, and not the discretion of the Commission, determining the rights of the parties. It follows that the construction affixed by the Commission to the statute upon which its entire action

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was predicated was wrong. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 164, 42 L. Ed. 414, 18 Sup. Ct. Rep. 45; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 654, 655, 44 L. Ed. 309, 311, 18 Am. & Eng. R. Cas., N. S., 167, 20 Sup. Ct. Rep. 209.

Although it thus appears that the Commission erred in its construction of the statute, nevertheless it is insisted that the action of the Commission should be affirmed. This contention is supported by propositions which are stated in argument in many different forms, but are really all reducible to the following summary:

Granting that the Commission wrongfully held that the carriers had no right of their own motion to avail of the competition at Nashville as producing the dissimilarity of circumstance and condition provided in the statute, nevertheless the order made by the Commission was right, because, as there was a difference between the rate charged to Nashville and that exacted to Chattanooga, there necessarily resulted an undue preference in favor of Nashville and a discrimination against Chattanooga, falling within the inhibition of the 3d section of the Act to Regulate Commerce. And, it is argued, even conceding this to be erroneous, as it was established by the proof that the Nashville rates were adequate, the Chattanooga rates were consequently unreasonably high, and hence were per se unreasonable. Assuming this proposition to be without foundation, it is insisted, as Chattanooga was a point at which various railroads centered, it was therefore in a position where, if competition had been allowed full play, it would have a rate at least as low as that at Nashville; and as the proof showed that the higher rate prevailing at Chattanooga was fixed by consent or agreement among the carriers, therefore Chattanooga by the effect of such agreement was deprived of the benefits of competition; the deduction being that the carriers who thus by agreement prevented the normal forces of competition from exerting their proper influence at Chattanooga should not be allowed to avail of the competition at Nashville to charge a lesser rate to that point than they did to Chattanooga. Besides, it is urged that, as it was shown that the lower rate at Nashville was caused by the conduct of the Louisville & Nashville Railroad in exceptionally making lower charges from Cincinnati to Nashville, that road should not be permitted to give a preference to Nashville, and then avail itself of the preference thus given to discriminate against Chattanooga, which would be the case if the difference of rates on freight passing through Chattanooga to Nashville were allowed to continue. This proposition being predicated on the assertion that it was established by proof that the line between Chattanooga and Nashville over which the traffic via the southern territory, passing through Chat-

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tanooga from the Atlantic seaboard, moved to Nashville, was in legal effect to be considered the Louisville & Nashville Railroad, since that corporation was the owner of a majority of the stock of such line between Chattanooga and Nashville, and therefore in effect controlled it.

Pausing for a moment to generally consider the foregoing contentions, it becomes manifest that in so far as they embody propositions of law they concede the error of the legal construction applied by the Commission, and yet invoke a seemingly different construction by which the erroneous rule of the Commission is to be in substance upheld. It is also clear that the propositions of fact which they embody cover the field of inquiry which the Commission excluded from view, and which that body held could not be ascertained from the record before it, but must be developed from the new inquiry which it was proposed to make when leave to depart from the restrictions of the long and short haul clause was invoked by the carriers at the hands of the Commission. Indeed, it is substantially accurate to say that the propositions of fact now asserted not only do this, but in effect are repugnant to the conclusions of fact found by the Commission on the branch of the controversy to which the Commission actually extended the inquiry by it made. It might well suffice to allow the result just stated, to which the propositions necessarily lead, to serve as a demonstration of their unsoundness. Inasmuch, however, as the legal contentions embodied in the propositions were in substance adopted by the circuit court upon the assumption that its action in so doing was in accord with the decision of this court in the case of Interstate Commerce Commission v. Alabama Midland R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. Rep. 45, and as some of the propositions of fact received the sanction of the circuit court of appeals, and were made the basis of its decree enforcing the order of the Commission, we will proceed to analyze them to the extent necessary to determine our duty in relation to them.

Coming to do so, it is at once apparent that the contentions divide themselves into two classes: the first, a proposition of law involving the construction of the Act to Regulate Commerce, and the others embracing ultimate deductions from the facts proven. The legal proposition is this: that where, in consequence of competitive conditions existing at a particular point, the dissimilarity of circumstance provided in the 4th section of the act arises, it cannot justify a carrier on his own motion in charging a lesser rate for the longer haul to the competitive point than is asked for the shorter haul to the noncompetitive point, if in doing so a preference in favor of the competitive point arises or a discrimination against the noncompetitive point is produced. That is to say, it is insisted that the provision as to substantially dissimilar circumstances and conditions of the 4th section and the commands of the 3d section as to dis-

Same-Same-  
Discrimination-  
Competition.

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crimination and undue preference, being found in the one statute, must be construed together, so that the dissimilarity of circumstance and condition cannot be availed of if either discrimination or preference will arise from doing so. We quote the exact language in which this proposition is stated by counsel, reproducing the italics by which the import of the contention is emphasized:

"Fifth. That the injury or prejudice to Chattanooga, shown by the proof to be the effect of the discriminations practised against Chattanooga and in favor of Nashville, *brings the case within the evil which the Act to Regulate Commerce was designed to remedy, and that competition, no matter how forceful, should not be held to nullify the law itself,—in other words, should not be held to justify the very wrongs which the law was enacted to remedy.*"

It is argued that this proposition is sustained by the opinions in the Alabama Midland Case, 168 U. S. 164, 42 L. Ed. 422, 18 Am. & Eng. R. Cas., N. S., 167, 18 Sup. Ct. Rep. 45, and in Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. Rep. 209, in both of which cases, as we have seen, the right of the carrier to take into view on his own motion competition which substantially affected traffic and rates as the producing cause of dissimilarity of circumstance and condition was upheld.

The portion of the opinion relied upon in the Alabama Midland Case is found on page 167, L. Ed. p. 423, Sup. Ct. Rep. p. 49, and is as follows:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the 3d and 4th sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration."

The expressions in the Behlmer Case which are relied upon are found on page 674, L. Ed. p. 319, Sup. Ct. Rep. p. 219, of the opinion in that case, and are as follows:

"It follows that, whilst the carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First, the absolute command of the statute that all rates shall be just and reasonable and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may, in

many cases, be involved in the determination of whether competition was such as created a substantial dissimilarity of condition; second, that the competition relied upon be not artificial or merely conjectural, but material and substantial, thereby operating on the question of traffic and rate making, the right in every event to be only enjoyed with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved, as well as those to be derived by the locality to which it is to be delivered."

The reasoning which we have thus quoted in the opinions in question, it is insisted, maintains the doctrine that, although competition of the character therein described may serve to engender dissimilarity of circumstance and condition which a carrier can avail of of its own motion, it does not necessarily do so. Whether it can be allowed to produce this effect, it is argued, must depend upon all the surrounding circumstances, such as the preference or discrimination which may arise from allowing it to be done, and the degree to which the interests of the public may be injuriously affected by permitting it to do so. To support this view, it is argued "that to hold otherwise would be placing Congress in the absurd position of laying down a rule, and then providing that the rule should not be enforced in the only cases in which violations of the rule were known to exist. In other words, enacting a law and providing at the same time that it should be of no effect."

But in substance this reasoning only amounts to the assertion that the settled construction of the statute, by which it has been held that real and substantial competition gives rise to the dissimilarity of circumstance and condition pointed out in the 4th section, is wrong, and should be overruled. The language of the opinions which is relied upon must be read in connection with its context, and must be construed by the light of the issue which was in controversy in the cases and which was decided; that is, the right of the carrier to take the competitive conditions into consideration as creating dissimilarity of circumstance and condition. The right of a carrier to do so could not have been sustained if the proposition now asserted had not necessarily been decided to be unsound. The summing up or grouping of the various provisions of the act, which was made in the passages relied upon, but served to point out that the provisions of the statute allowing competition to become the cause of dissimilarity of circumstance and condition could operate no injurious effect in view of the other provisions of the act protecting against discrimination and preference; that is, the undue preference and unjust discrimination against which the other provisions of the statute were aimed. True it is that all of the provisions of the statute must be interpreted together, and because this is the elementary rule the argument now pressed upon our attention is unsound. If it were adopted, it would follow of necessity

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that competition could never create such a dissimilarity of circumstance and condition as would justify the lesser charge to the competitive point that was made to the noncompetitive point. This would be the inevitable consequence, since under the view which the argument assumes it would be impossible for the lesser rate to prevail to the competitive point without creating a preference in favor of that point, and without giving rise to a discrimination against the noncompetitive point to which the higher rate was asked. Thus the reasoning conduces to the deduction which it is advanced to refute; that is, the assumption that the statute at one and the same time expressly confers a right, and yet specifically destroys it. This is plainly the consequence flowing from the argument that competition, "however forceful" it may be, cannot produce dissimilarity of circumstance and condition if discrimination and preference is held to necessarily arise from the charging of the lessor rate to the longer-distance competitive point.

It is not difficult to perceive the origin of the fallacy upon which the contention rests. It is found in blending the 3d and 4th sections in such a manner as necessarily to destroy one by the other, instead of construing them so as to cause them to operate harmoniously. In a supposed case when, in the first instance, upon an issue as to a violation of the 4th section of the act, it is conceded or established that the rates charged to the shorter-distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer-distance point, it must result that a discrimination springing alone from a disparity in rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the 3d section of the act forbidding the making or giving of an undue or unreasonable preference or advantage will not apply. The prohibition of the 3d section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. And special attention was directed to this view in the Behlmer Case, in the passage which we have previously excerpted. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it cannot be that the availing of this right is the cause of the preference; and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination.

The only principle by which it is possible to enforce the



whole statute is the construction adopted by the previous opinions of this court; that is, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and noncompetitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it. We say seemingly on the one hand and apparently on the other, because in the supposed cases the preference is not "undue" or the discrimination "unjust." This is clearly so, when it is considered that the lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge. Indeed, the findings of fact made by the Commission in this case leave no room for the contention that either undue preference in favor of Nashville or unjust discrimination against Chattanooga arose merely from the act of the carriers in meeting the competition existing at Nashville. The Commission found that if the defendant carriers had not adjusted their rates to meet the competitive condition at Nashville, the only consequence would have been to deflect the traffic at the reduced rates over other lines. From this it follows that, even although the defendant carriers had not taken the dissimilarity of circumstance and condition into view, and had continued their rates to Nashville just as if there had been no dissimilarity of circumstance and condition, the preference in favor of Nashville growing out of the conditions there existing would have remained in force, and hence the discrimination which thereby arose against Chattanooga would have likewise continued to exist. In other words, both Nashville and Chattanooga would have been exactly in the same position if the long and short haul clause had not been brought into play.

That, as indicated in the previous opinions of this court, there may be cases where the carrier cannot be allowed to avail of the competitive condition because of the public interests and the other provisions of the statute, is of course clear. What particular environment may in every case produce this result cannot be in advance indicated. But the suggestion of an obvious case is not inappropriate. Take a case where the carrier cannot meet the competitive rate to a given point without transporting the merchandise at less than the cost of transportation, and therefore without bringing about a deficiency, which would have to be met by increased charges upon other business. Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest,

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since a tendency towards unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places. But no condition of this character is here in question, since the Commission find as follows:

"There is a conceded margin of profit in the rates now in force to Nashville and Memphis, with reference to the additional expense incurred in carrying eastern traffic to those destinations, but whether that margin affords reasonable compensation for the services thus rendered cannot be determined from the evidence."

And the fact thus established was not controverted either in the opinion of the circuit court or in that of the circuit court of appeals, and is not now denied. Applying the principle to which we have adverted to the condition as above stated, it is apparent that if the carrier was prevented under the circumstances from meeting the competitive rate at Nashville, when it could be done at a margin of profit over the cost of transportation, it would produce the very discrimination which would spring from allowing the carrier to meet a competitive rate where the traffic must be carried at an actual loss. To compel the carriers to desist from all Nashville traffic under the circumstances stated would simply result in deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting the competition, although they could do so at a margin of profit, the loss which would arise from the disappearance of such business, without anywise benefiting the public.

The circuit court in enforcing the order of the Commission did not seemingly adopt the full scope of the proposition which we have just considered, but applied it in a modified form. Thus, it concluded that although the charge of the lesser rate to the longer point, in some instances might be justified by the dissimilarity of circumstance and condition arising from competition, and therefore would not per se necessarily produce a preference, it would do so if by comparison between the dissimilarity of circumstance and condition and the dissimilarity of charge it was found that the one was disproportionate to the other.

After referring to the previous rulings of the Commission maintaining that competition by carriers subject to the act could not be taken into view by a carrier in fixing rates to the competitive points without the previous assent of the Commission, the court (85 Fed. Rep. 117) quoted the following statement of the Commission in an opinion announced on December 31, 1897:

"Since then, however, the Supreme Court of the United States, by its decision in the case, *Interstate Commerce Commission v. Alabama Midland R. Co.* (decided Nov. 8, 1897), 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. Rep. 45, has deter-

mined that this view of the law is erroneous, and that railway competition may create such dissimilar circumstances and conditions as exempt the carrier from an observance of the long and short haul provision. Under this interpretation of the law, as applied to the facts found in this case, we are of the opinion that the charging of the higher rate to the intermediate points, as set forth, is not obnoxious to the 4th section. The section declares that the carrier shall not make the higher charge to the nearer point under 'substantially similar circumstances and conditions.' If the conditions and circumstances are not substantially similar, then the section does not apply, and the carrier is not bound to regard it in the making of its tariffs."

The court thereupon said:

"Now, I do not understand that such a conclusion follows from that decision. On the contrary, I suppose that when a violation of the long and short haul provision is charged, competition is one of the elements which enter into the determination whether the conditions are similar, and if dissimilarity is found, then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of. The language of the act ought not to be tied up by such literal construction. If it were, then, if it should be found that the dissimilarity of conditions is really in favor of the locality discriminated against, the provision would not apply,—a result contrary to the manifest intent. In other words, my opinion is that the restraint of § 4 is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates, and that it is competent under that section to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made. But the long and short haul clause is only one of the specific provisions employed for the general purpose of the act. The 3d section underlies the 4th and supplies the principle on which it rests; so that, if the literal construction referred to be put upon the 4th section, the case would still be exposed to the 3d section, which forbids undue preference to one locality, or the subjection of another to any undue disadvantage."

But this reasoning, whilst it does not apparently wholly rest on the erroneous view which we have previously refuted, in substance but applies it. Indeed, it not only does this, but it more markedly destroys one provision of the statute by the other, since it in effect declares that the greater the competition at any given point the less power has this fact to produce the dissimilarity of circumstance and condition provided in the statute. That such is the conclusion to which the reasoning resolves itself must be the case, when it is considered that the more active competition is at a particular point the less the rate will be to that point, and the greater, therefore,

the disparity between the charge to the competitive point and that made to the noncompetitive one. The proposition, then, is this, that the greater and more potential is the influence of competition on rates and traffic, the less will be its force to engender dissimilarity of circumstance and condition; that is to say, that the causes specified in the statute are to be allowed to produce their influence in inverse ratio to their strength and importance.

As the circuit court only affirmed the order of the Commission, which directed the carriers to desist from charging a greater compensation for the shorter haul to Chattanooga than for the longer haul to Nashville, there is no room for the conclusion that it found affirmatively that, independently of the charge to Nashville, the rate to Chattanooga was per se unreasonable. For, of course, a decree which ordered the carriers to desist from charging a greater compensation for the lesser than for the longer haul would be in no way responsive to the conclusion that the rate for the lesser distance was unreasonable in and of itself. Such a decree would in effect authorize the carrier to continue to charge at its election a rate which was in itself unreasonable to the shorter point. Indeed, it cannot be held that the order rested upon the unreasonableness per se of the rate to Chattanooga, without implying that the court directed and commanded the carrier to bring about a preference and discrimination by charging the same price for the carriage of traffic to Nashville, the much more distant point, that was exacted for the carriage to Chattanooga. Coming, then, to the propositions of fact, we repeat that each and every one of them involve considerations which were wholly excluded from view by the Commission, under the construction of the statute which was applied, because it was deemed that they would present themselves for consideration when the carrier petitioned the Commission to be relieved from the restrictions of the long and short haul clause, and, moreover, that these propositions of fact are not in harmony with the findings made by the Commission on the particular subject which it passed on. That the propositions of fact referred to are amenable to the considerations we have just stated is indisputable, when it is considered that taken together they assert the existence of conditions which the Commission decided could not be ascertained in the state of the record before it, but could only be arrived at by a further unprejudiced examination, which, under the view taken, it was unnecessary to make until a future time. And that the facts now relied on are irreconcilable with what was found by the Commission on the subject which it passed on is likewise clear. Thus, the contention that the rate to Chattanooga is shown to have been absolutely fixed by agreement, and therefore to be abnormally high, is necessarily repugnant to the express finding of the Commission that the rates in the southern territory, whilst originally the offspring of agreement, were also the result of

the volume of business in that territory, and, although they might give rise to some disadvantage, did not do so to the extent of making the rates in and of themselves a just subject of complaint. So, also, the insistence that it is shown that Chattanooga by its position was entitled to at least an equality of rates with Nashville is repugnant to the finding of the Commission, that whilst it was shown that some reduction would be just at Chattanooga the degree of that reduction could not be determined without a further investigation embracing the relation of Chattanooga to other points, and without a careful readjustment of the rates to such point. Again, the assertion that the road from Chattanooga to Nashville growing out of the stock ownership was in legal effect the Louisville & Nashville Railroad is necessarily antagonistic to the express finding of the Commission that the carriers through Chattanooga to Nashville were placed in a position where they must either meet the competition at Nashville or abandon all traffic to that point. The question which then arises is, shall this court now pass upon all the issues which the Commission excluded from view because of a mistake in law committed by that body, and in doing so not only overthrow the findings of fact made by the Commission, but also adopt new findings antagonistic to those which the Commission made, and this for the purpose, not of affirming the order entered by that body, but to enable us to reach a result which the Commission itself declared could only be justly arrived at after a further and unprejudiced investigation by it of the situation which the controversy involves?

Reviewing of Acts  
of Commission.

True, it is insisted that such original action is not required at our hands, because, it is asserted, the circuit court of appeals considered and passed on the propositions relied upon, and the action of that court relieves this court from the duty of entering upon an original investigation of the whole evidence to determine the entire field of controversy.

It requires only, however, a brief reference to the opinion of the circuit court of appeals to show that this contention is unfounded. In substance, that court stated in its opinion that it considered that the rates to Chattanooga, which was in the southern territory, had been fixed by agreement of the carriers, as had been the other rates in that territory; that as Nashville, which was also in the southern territory, was given a low rate because of the action of the Louisville & Nashville Railroad in exceptionally lowering its rates from Cincinnati to that point, the situation at Chattanooga entitled it to the same rates. The court, moreover, thought that the Louisville & Nashville Railroad, which owned the line from Cincinnati to Nashville, was in no position, as the owner of a majority of the stock in the road from Chattanooga to Nashville, to avail of the competition at Nashville as a basis for charging the lesser rate for the longer haul through Chattanooga to Nashville. It was, besides, concluded that where a rate to a par-

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ticular point was the product of agreement which stifled competition, such rate could not become the basis upon which to predicate the right of a carrier to charge a lesser sum for the carriage of freight passing through that point to a more distant place, because of the competition at such more distant place. The court summed up its conclusions as follows (39 C. C. A. p. 425, 99 Fed. Rep. p. 63):

"We are pressed with the argument that to reduce the rates to Chattanooga will upset the whole southern schedule of rates, and create the greatest confusion; that for a decade Chattanooga has been grouped with towns to the south and west of her, shown in the diagram; and that her rates have been the key to the southern situation. The length of time which an abuse has continued does not justify it. It was because time had not corrected abuses of discrimination that the Interstate Commerce Act was passed. The group in which Chattanooga is placed, shown by the diagram above, puts her on an equality in respect to eastern rates with towns and cities of much less size and business, and much further removed from the region of trunk-line rates, and with much fewer natural competitive advantages. If taking Chattanooga out of this group and putting it with Nashville requires a readjustment of rates in the south, this is no ground for refusing to do justice to Chattanooga. The truth is, that Chattanooga is too advantageously situated with respect to her railway connections to the north and east to be made the first city of importance to bear the heavier burden of southern rates, when Nashville, her natural competitor, is given northern rates. The line of division between northern and southern rates ought not to be drawn so as to put her to the south of it, if Nashville is to be put to the north of it. And we feel convinced from a close examination of the evidence that, but for the restriction of normal competition by the Southern Traffic Association, her situation would win for her certainly the same rates as Nashville. It may be that the difficulty of readjusting rates on a new basis is what has delayed justice to Chattanooga. It may well be so formidable as to furnish a motive for maintaining an old abuse."

The decree which was entered, however, did not declare the rates charged to Chattanooga to be unreasonable, but simply affirmed the order of the Commission directing that no greater sum be charged for the carriage of freight to Chattanooga, the shorter, than was exacted to Nashville, the longer, distance. As we have already shown, such a decree is not responsive to the conclusion that the rates to Chattanooga were in and of themselves unreasonable, since the right to continue to exact them was sanctioned, provided the traffic to Nashville was either abandoned or the rate to Chattanooga made the same as to Nashville.

Without taking at all into view the legal propositions announced by the circuit court of appeals in its opinion, and

conceding, without passing upon such questions, that they were all correctly decided, it is plain that all the premises of fact upon which the propositions of law decided by the circuit court of appeals rest are at variance with the propositions of fact found by the Commission, in so far as that body passed upon the facts. From this it results that to decide the case in the aspect in which it is now presented we would be obliged to go into the whole evidence, as a matter of original impression, in order to determine the complex questions which the case presents. Among those which of necessity would arise for decision would be whether the original agreement fixing rates to the southern territory, made long since and acted on consecutively for years, was of such a nature as to cause those rates to be illegal, although they might be found to be just and reasonable in and of themselves. If not, whether Chattanooga was from its situation properly embraced in the southern territory, and, if not, whether the Louisville & Nashville Railroad had violated the law by exceptionally reducing its rates to Nashville. If it had not, did it follow, because the condition at Nashville gave that city an exceptionally low rate, that Chattanooga was in a position to be entitled, as a matter of right, to as low or a lesser rate?

To state these issues is at once to demonstrate that their decision, as a matter of first impression, properly belonged to the Commission, since upon that body the law has specially imposed the duty of considering them. Whilst the court has in the discharge of its duty been at times constrained to correct erroneous constructions which have been put by the Commission upon the statute, it has steadily refused, because of the fact just stated, to assume to exert its original judgment on the facts, where, under the statute, it was entitled, before approaching the facts, to the aid which must necessarily be afforded by the previous enlightened judgment of the Commission upon such subjects. This rule is aptly illustrated by the opinion in *Louisville & N. R. Co. v. Behlmer* (1900) 175 U. S. 648, 44 L. Ed. 309, 18 Am. & Eng. R. Cas., N. S., 167, 20 Sup. Ct. Rep. 209, in which case, after pointing out the same error of construction adopted and applied by the Commission in the present case, the court declined to undertake an original investigation of the facts, saying (p. 675, L. Ed. p. 319, Sup. Ct. Rep. p. 219):

"If, then, we were to undertake the duty of weighing the evidence in this record, we would be called upon, as a matter of original action, to investigate all these serious considerations which were shut out from view by the Commission, and were not weighed by the circuit court of appeals, because both the Commission and the court erroneously construed the statute. But the law attributes *prima facie* effect to the findings of fact made by the Commission, and that body, from the nature of its organization and the duties imposed upon it by

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the statute, is peculiarly competent to pass upon questions of fact of the character here arising. In *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666, the court found the fact to be that the Commission had failed to consider and give weight to the proof in the record, affecting the question before it, on a mistaken view taken by it of the law, and that on review of the action of the Commission the circuit court of appeals, whilst considering that the legal conclusion of the Commission was wrong, nevertheless proceeded as a matter of original investigation to weigh the testimony and determine the facts flowing from it. The court said (p. 238, L. Ed. p. 954, Inters. Com. Rep. p. 441, Sup. Ct. Rep. p. 682):

‘If the circuit court of appeals was of opinion that the Commission in making its order had misconceived the extent of its powers, and if the circuit court had erred in affirming the validity of an order made under such misconception, the duty of the circuit court of appeals was to reverse the decree, set aside the order, and remand the cause to the Commission in order that it might, if it saw fit, proceed therein according to law. The defendant was entitled to have its defense considered, in the first instance at least, by the Commission upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The question whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the Commission in the light of all facts duly alleged and supported by competent evidence; and it did not comport with the true scheme of the statute that the circuit court of appeals should undertake, of its own motion, to find and pass upon such questions of fact in a case in the position in which the present one was.’

“We think these views should be applied in the case now under review.”

The decree of the Circuit Court of Appeals should be reversed, with costs, and the case be remanded to the Circuit Court, with instructions to set aside its decree adjudging that the order of the Commission be enforced, and to dismiss the application made except her husband was a coplaintiff, be without prejudice to the right of the Commission to proceed upon the evidence already introduced before it, or upon such further pleadings and evidence as it may allow to be made or introduced, to hear and determine the matter in controversy according to law.

And it is so ordered.

Mr. Justice Harlan dissents.



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INTERSTATE COMMERCE COMMISSION, Appt.,

v.

CLYDE STEAMSHIP COMPANY, Georgia Railroad Company, *et al.*

THE SAME

v.

WESTERN & ATLANTIC RAILROAD COMPANY *et al.*

THE SAME

v.

CLYDE STEAMSHIP COMPANY *et al.*

(Argued November 5, 6, 1900. Decided April 8, 1901.)

[21 Sup. Ct. Rep. 512.]

Interstate Commerce—Long and Short Hauls—Discrimination—Right of Carrier to Consider Facts Not Found by Commission.\*—Competition which is actual and substantial in its effect upon rates, if resulting from the action of other carriers who are subject to the Act to Regulate Commerce, may produce the dissimilarity of circumstances and conditions provided in § 4 of the act, so as to enable a carrier in adjusting rates to take into view such competition without the previous assent of the Interstate Commerce Commission.

Review of Acts of Commission.—On application to the courts to enforce an order of the Interstate Commerce Commission, which is based on an erroneous construction of the statute, by reason of which error it has declined adequately to find the facts, the courts will not proceed to an original investigation of the facts which should have been passed upon by the Commission, but will correct the error of law committed by that body, and, after doing so, dismiss the application without prejudice to the right of the Commission to make a further investigation of the facts.

Appeals from the United States Circuit Court of Appeals for the Fifth Circuit to review a decision affirming decrees which decline to enforce orders of the Interstate Commerce Commission. Modified.

See same case below, 35 C. C. A. 217, 93 Fed. Rep. 83. The facts are stated in the opinion.

Messrs. L. A. Shaver and James M. Beck for appellant.  
Mr. Ed. Baxter for appellees.

Mr. Justice White delivered the opinion of the court:

These cases, with others of like character, originated in complaints brought before the Interstate Commerce Commission by the railroad commission of the state of Georgia in the names of the members of that body. Each complaint

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\*See preceding case and foot-note.

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averred that the defendant carriers were guilty of wrong in that they were illegally charging a greater rate to certain shorter-distance points than they were asking to certain longer-distance points, in violation of the long and short haul clause of the 4th section of the Act to Regulate Commerce, and, as ancillary to this complaint, that the rates exacted by the defendant carriers were unreasonable and amounted to both an undue preference and an unjust discrimination.

In case No. 68 the complaint was that the rates charged by the defendant for freight transportation by continuous carriage from the city of New York and other eastern seaboard points to Greensboro, Madison, Social Circle, Covington, Conyers, and Stone Mountain,—towns and stations situated on the line of the Georgia railroad between Augusta, the eastern terminus of that road, and Atlanta, its western terminus,—were greater in each case than the amounts charged and received for freight carried to the city of Atlanta, the longer-distance point.

In case No. 69 the complaint was that the rates of freight charged by the defendants for freight transportation by continuous carriage from the city of Cincinnati and other Ohio river points to Marietta, Acworth, Cartersville, Kingston, Adairsville, and Calhoun,—towns and stations situated on the Western Atlantic Railroad between Chattanooga, the northern terminus of that road, and Atlanta, the southern terminus,—were greater on each class than the amount charged and received for freight carried to Atlanta, the longest-distance point.

In case No. 70 the complaint was that the rates of freight charged by the defendants for freight transportation by continuous carriage from the city of New York and other eastern points to West Point, La Grange, Hogansville, Grantville, and Newman,—towns and stations on the Atlanta & West Point Railroad, Atlanta being the eastern terminus of said road and the town of West Point its western terminus,—were greater on each class than the amount charged and received for freight to a longer-distance point, viz., the city of Opelika, situated further west on a connecting railroad known as the Western Railroad of Alabama.

After issues made by answers, and hearing had upon evidence introduced before the Commission, that body entered an order in each case, in substance commanding the defendants to cease and desist from charging and receiving any greater compensation in the aggregate for the transportation of property between the points of initial shipments mentioned in the complaint and the shorter-distance points therein referred to than was exacted to the more distant points specified in the various complaints. The order, however, contained a proviso that it should not be operative until a date designated, to enable the defendants to apply under the 4th section of the act, to be relieved from the operation of that section in respect to the prohibition therein contained against charging or receiving any greater compensation for a lesser

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than for a longer haul, under substantially similar circumstances and conditions. 5 I. C. C. Rep. 327, 4 Inters. Com. Rep. 120.

The defendant carriers, not having availed of the permission thus accorded, and refusing to obey, the Commission, in due time, began proceedings in equity in the circuit court of the United States for the northern district of Georgia to enforce obedience to its orders. In the circuit court additional testimony was taken. All the cases were considered and passed on together. The court decided that the Commission had erroneously construed the statute in holding that competition which was actual and substantial in its effect upon rates, if resulting from the action of other carriers who were subject to the Act to Regulate Commerce, could not produce the dissimilarity of circumstances and conditions provided in the 4th section of the act, so as to enable a carrier in adjusting rates to take into view such competition without the previous assent of the Commission. It moreover found that the rates in controversy were in and of themselves just and reasonable, and did not give rise either to undue preference or unjust discrimination. The court therefore declined to enforce the order of the Commission. 88 Fed. Rep. 186. On appeal to the circuit court of appeals the decrees of the circuit court were affirmed. 35 C. C. A. 217, 93 Fed. Rep. 83.

In deciding the Alabama Midland Case, 168 U. S. 164, 42 L. Ed. 422, 18 Sup. Ct. Rep. 45, we had occasion to refer to the opinion announced by the Commission in the cases now under review, because the ruling of the Commission in the matter which was examined in the Midland Case was like the one made in the present cases. The opinion by which the Commission sustained the ruling by it made in the East Tennessee, Virginia, & Georgia Case, which we have just examined and decided to be erroneous, was also expressly predicated on the opinion which the Commission had previously expressed in these cases. It follows that the error committed by the Commission in interpreting the statute in these cases has been at least twice heretofore pointed out in the decisions of this court, and hence further examination of the subject is unnecessary. It will be seen from an inspection of the able opinions of the courts below that they expounded the statute in entire accord with the construction which we had previously given to it, and which we have again applied in the East Tennessee, Virginia, & Georgia Case. Despite, however, the error of law which the Commission committed in these cases, and in consequence of which error it made no investigation of the facts, but postponed the performance of its duty on this subject until a further application was made for relief, it is now urged that we should enter into an original investigation of the facts for the purpose of considering a number of questions as to discrimination, as to preference, as to reason-

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ableness of rates, as to the relation which the rates at some places bore to those at others, in order to discharge the duty which the statute has expressly in the first instance declared should be performed by the Commission. In the East Tennessee, Virginia, & Georgia Case, just decided, 180

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U. S. —, post, p. 516, 21 Sup. Ct. Rep. 516, following the ruling made in Louisville & N. R. Co. v. Behlner, 175 U. S. 648, 667, 44 L. Ed. 309, 316, 18 Am. & Eng. R. Cas., N. S., 167, 20 Sup. Ct. Rep. 209, and previous cases, we have held that, where the commission by reason of its erroneous construction of the statute had, in a case to it presented, declined to adequately find the facts, it was the duty of the courts, on application being made to them to enforce the erroneous order of the Commission, not to proceed to an original investigation of the facts which should have been passed upon by the Commission, but to correct the error of law committed by that body, and, after doing so, to remand the case to the Commission so as to afford it the opportunity of examining the evidence and finding the facts as required by law. The investigation which we have given the questions which arise in these cases, and the consideration which we have bestowed on the issues which were involved in the case of the East Tennessee, Virginia & Georgia Railroad, have served but to impress upon us the necessity of adhering to that rule, in order that the statute may be complied with both in letter and spirit. Acting in accordance with this requirement, whilst affirming the decree below, which refused to enforce the order of the Commission, we shall do so without prejudice to the right of the Commission, if it so elects, to make an original investigation of the question presented in these records.

The decrees of the Circuit Court of Appeals and of the Circuit Court must be modified by providing that the dismissal of the bills shall be without prejudice to the right of the Interstate Commerce Commission, if it so elects, to make an original investigation of the questions contained in the records pertinent to the complaints presented to that body, and, as so modified, said decrees must be affirmed, and it is so ordered.

Mr. Justice Harlan dissents.

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CUMBERLAND & P. R. CO.

v.

STATE.

(Court of Appeals of Maryland, Feb. 20, 1901.)

[48 Atl. 503.]

**Taxation — Gross Receipts — Interference with Interstate Commerce.\***—The defendant railroad company was organized under a char-

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\*See notes at end of case.

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ter from the state of Maryland, and its line was operated partly in that state and partly in another. *Held*, that a tax by the state of Maryland on such proportion of the entire gross receipts of the road as the length of its line in Maryland bears to the whole length of its line was not invalid as an interference with interstate commerce.

Same—Interest—Amount.—Laws 1890, c. 559, § 6, provides that taxes on railways shall be due and payable July 1st in each year, and, if not paid within 30 days thereafter, the corporation shall forfeit and pay to the state an additional amount of 5 per cent. as a penalty; and section 7 declares that, if judgment is rendered for the state in any suit to recover such taxes, judgment shall be entered without stay for the amount of the taxes and the 5 per cent. penalty, with interest and cost. *Held* that, where judgment was entered for the state in an action against a railway company for taxes, the state was entitled to interest from August 1st on the sum recovered as taxes, but not on the penalty.

Appeal from circuit court, Allegany county.

Action by the state of Maryland against the Cumberland & Pennsylvania Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The following are the prayers of plaintiff and defendant:

Plaintiff's prayer: "The plaintiff prays the court to rule as matter of law that under the pleadings and agreed statement of facts herein the plaintiff is entitled to recover the amount of the state taxes levied against the defendant by the acts of assembly of 1890 and 1896 for each of the years from 1891 to 1898, both inclusive, according to the computation of the same made by the comptroller upon the defendant's returns of the gross receipts for each of the years preceding the 31st day of January in each of said years, as set out in said agreed statement, together with interest upon the taxes for each of said years from the 1st day of August after the same were each so respectively levied, and also the penalty of five per cent. (without interest) upon the whole amount of said taxes levied by said acts of assembly for default in payment."

Case Stated. Defendant offered six prayers, as follows: "(1) The defendant prays the court to rule that the tax calculated and assessed by the state tax commissioner in each count of the declaration mentioned is a tax on the gross receipts of the defendant, and that the plaintiff can recover only such portion of said tax as the amount of gross receipts of the defendant derived from business done within the state of Maryland, and exclusive of its gross receipts derived from the business of interstate commerce, bears to the amount of its gross receipts taxed as aforesaid. (2) The defendant prays the court to rule that the tax calculated and assessed by the state tax commissioner in each count of the declaration mentioned is a tax on the gross receipts of the defendant, and that in proportion to the extent that said gross receipts are derived from the business of inter-

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state commerce said tax is invalid, and the plaintiff cannot recover such portion thereof. (3) The defendant prays the court to rule that the plaintiff can recover on each count of the declaration no greater sum as a tax than the tax levied by the act of the assembly on the gross receipts of the defendant, exclusive of the gross receipts which were in fact directly paid to it for the business of interstate commerce carried on by it during the year in said count mentioned. (4) The defendant prays the court to rule that the plaintiff cannot recover in this suit the penalties claimed in the several counts of the declaration. (5) The defendant prays the court to rule that the plaintiff cannot recover any interest on account of the defendant's failure to pay the whole or any part of the taxes sued for. (6) The defendant, by its attorneys, prays the court to say, as the law in this case, that under the pleadings and all the evidence as contained in the agreed statement of facts in this cause filed the plaintiff is only entitled to recover under the Acts of 1890 and 1896 of the State of Maryland, in the declaration of the plaintiff mentioned, the taxes properly calculated according to the provisions of said acts upon the several amounts received by the said defendant from the business done by the said defendant entirely within the state of Maryland for each of the years in the said plaintiff's declaration mentioned; and that the plaintiff is not entitled to recover any sum as taxes upon the several amounts received by the said defendant for the transportation and carriage of passengers and freight in transit from points without the state of Maryland to points within the state of Maryland and from points within the said state of Maryland to points without the same, and particularly for the transportation of coal shipped and delivered by the owners thereof to the defendant in the state of Maryland, destined for continuous transportation, and so transported, to market at points beyond the limits of the state of Maryland; that is to say, to points in certain other states of the United States of America, and the District of Columbia, and the Dominion of Canada and other foreign countries."

Argued before McSherry, C. J., and Fowler, Briscoe, Pearce, Page, and Schmucker, JJ.

Robert H. Gordon, Wm. F. Frick, Hugh L. Bond, Jr., and John W. Lord, for appellant.

George R. Gaither and Benj. A. Richmond, for appellee.

Pearce, J. This is an appeal from a judgment rendered by the circuit court for Allegany county in favor of the state of Maryland for the sum of \$76,992.73. The state sued to recover from the Cumberland & Pennsylvania Railroad Company certain taxes claimed to be due for the eight years from January 31, 1890, to January 31, 1898. These taxes for each of the six years up to January 31, 1896, were duly assessed under the provisions of section 1 of chapter 559 of the Acts of 1890, and

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those for the two ensuing years, under the provisions of section 146 of chapter 120 of the Acts of 1896, which repealed and re-enacted the act of 1890. A plea of nil debet was filed by the defendant, upon which issue was joined, and the case was submitted to the court without the intervention of a jury, upon an agreed statement of facts; the plaintiff offering one prayer, which was granted, and the defendant offering six prayers, all of which were rejected; to which rulings the defendant excepted. These prayers will be fully set out by the reporter.

The act of 1890 declared: "A state tax of one per centum shall be and is hereby levied annually upon the gross receipts of all railroad companies worked by steam, incorporated by or under the authority of this state, and doing business therein.

\* \* \* If any such railroad company has any part of its roads in this state, and a part thereof in another state or states, such company shall return a statement of its gross receipts over its whole line of road, together with a statement of the whole length of its line in this state, and such company shall pay to the state at the said rates hereinbefore prescribed, upon such proportion of its gross earnings as the length of its line in this state bears to the whole length of its line." The act of 1896 increased the tax upon gross receipts of railroad companies worked by steam power, establishing a scale of rates graded according to the earnings per mile, and specifically declaring the tax to be a franchise tax, but leaving unchanged the apportionment according to the mileage within the state. The agreed statement of facts sets out that part of the defendant's gross receipts upon which the taxes had been assessed by the state tax commissioner were derived from the business of interstate commerce, and what part from business exclusively within the state; also what amount of taxes for the period mentioned was claimed by the state upon the entire gross receipts of defendant, and what amount for the same period was admitted to be due by the defendant upon the entire gross receipts upon business done exclusively within the state; and sets out the tender of this last amount by the defendant at the proper times, and its refusal by the plaintiff. It also shows that the defendant's road is operated in Maryland under a charter from the state of Maryland and in West Virginia under a charter from the state of Virginia; that the termini of its road are at the city of Cumberland in Maryland, at the Pennsylvania state line, and at Piedmont in West Virginia; that the whole length of its road is 32.65 miles, of which 32.44 are in Maryland, and 21 in West Virginia, and that it is chiefly a coal road, forming a connecting link between the Baltimore & Ohio system at Piedmont and the Pennsylvania Railroad system at the state line of Pennsylvania; and that everything necessary to be done by defendant in order to avail itself of the defense made has been duly done.

The single question thus presented for determination is

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whether the tax sued for is in part invalid, as being a regulation of commerce among the several states, and therefore in contravention of article 1, § 8, of the constitution of the United States. This question, always important in principle, and serious in result, as involving a possible restriction upon the sovereign power of taxation, essential to the states for the maintenance of their existence,—an existence which has been declared “indestructible” by the states themselves,—has in recent years assumed a larger importance and graver aspect by reason of the enormous increase of expenditures by the federal government, involving correspondingly heavy federal taxation upon the citizens of the several states; since, if the states are denied the power, in return for franchises granted by them to corporations of their creation, to require of them their just contribution to the cost of government, the deficiency must be supplied by constantly increasing exactions from their already heavily burdened citizens. The supreme court of the United States, in 1872, recognized and declared the wrong of unduly narrowing the limits of state taxation by its decision in *Osborne v. Mobile*, 16 Wall. 479, 21 L. Ed. 470, in which it sustained an ordinance of the city of Mobile requiring a license for any railroad or express company to transact in Mobile a business extending beyond the limits of the state of Alabama; Chief Justice Chase saying: “It is as important to leave the rightful powers of the state in respect to taxation unimpaired as it is to maintain the power of the federal government in their integrity;” and this language was concurred in by Justices Fields, Davis, Miller, Bradley, and Strong, who participated in many of the subsequent decisions of that court involving the consideration of that clause of the constitution.

Standing, then, upon the just and impregnable principle announced in the language which we have reproduced, we will consider the question in the light of all the authority which can be derived from the decisions of the supreme court upon statutes of similar form and design to that before us. Unless the decision in the case of *In re State Tax on Railway Gross Receipts*, 15 Wall. 284, 21 L. Ed. 164, is to be disregarded, it must be accepted as requiring the affirmance of the judgment here assailed; and that appellant's counsel, conceding this, have directed all their energy to the effort to show that that decision, if not literally overruled, has been so criticised and discredited by later decisions as to be shorn of all authority, and to warrant, if not to require, the state courts to refuse longer to follow it. The circumstances under which that decision was pronounced are so noteworthy as to justify extended reference to them here. At the December term, 1872, of the supreme court of the United States, two cases were argued, in each of which the Reading Railroad Company was the appellant and the state of Pennsylvania was the appellee. In each of these cases, the supreme court of Pennsylvania had

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affirmed the validity of a statute of the state, which the plaintiff in error alleged to be in contravention of that clause of article 1, § 8, of the constitution of the United States, which is here drawn in question. In the first of these cases the statute under consideration was the act of 1864, which required every transportation company doing business in the state to make quarterly returns of the number of tons of freight carried over its road, and imposed a tax of from two to five cents upon every ton of freight so carried, according to a certain classification of freight. In the latter case the statute in question was the act of 1866, which required all transportation companies incorporated under the laws of the state to make semiannual returns of their gross receipts, and imposed a tax of three-fourths of 1 per centum upon such gross receipts. In the former case the statute was held repugnant to the clause of the constitution mentioned. In the latter it was held not to be so repugnant. The former is officially reported under the title of "Case of the State Freight Tax," and the latter under the title of "State Tax on Railway Gross Receipts"; thus emphasizing the discrimination drawn by the court in laying down the principles decided in the respective cases, and embodying these principles, so to speak, in the titles under which they were directed to be reported. They were argued in immediate succession, before the same judges, and by the same counsel. The former case was the first decided, the decision in the latter following without haste, but within a short time thereafter. All the conditions, therefore, were favorable to careful consideration, and to calm and impartial judgment, and these decisions must, of necessity, commend themselves as the deliberate and fixed conclusions of a great tribunal, upon great principles, involving great interests, binding upon all inferior tribunals, and entitled to every presumption of soundness and stability when assailed in that tribunal itself by those whose interest it is to overthrow or weaken them, or when questioned by judges, however eminent, whose individual views are not in accord with the established doctrine. In the Case of the State Freight Tax the court said: "The question calls upon us to trace the line, always difficult to be traced, between the limits of state sovereignty in imposing taxation and the power and duty of the federal government to protect and regulate interstate commerce;" and, after declaring that the constitutionality of a state tax is to be determined not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid, asked: "Upon what is the tax imposed to be considered as laid? Where does the substantial burden rest? Very plainly, it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried, and the tax is not proportioned to the business done

in transportation. The transportation of freight is a constituent of commerce itself, \* \* \* and a tax upon freight transported from state to state is a regulation of interstate transportation, and therefore a regulation of commerce between the states; and the conclusion is inevitable that it is in conflict with the constitution of the United States. \* \* \*

But, while holding this, we fully recognize the power of each state to tax, at its own discretion, its own internal commerce, and the franchises, property, or business of its own corporations." Having thus plainly and conclusively traced the line between the power of the state to impose and of the federal government to prohibit taxation, and having asserted the power and duty of the federal government in the case before it, the court turned to the consideration of the Case of the State Tax on Gross Railway Receipts, and proceeded to inquire whether such a tax is a tax upon commerce, so far as that commerce consists in moving goods or passengers across state lines, using in the course of the opinion delivered this lucid and convincing reasoning: "No doubt every tax upon personal property, or upon occupation, business, or franchises, affects more or less the subjects and the operations of commerce, yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the constitution. We think it may be safely asserted that the states have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural persons, and to the same extent. We think, also, that such taxation may be laid upon a valuation, or may be an exercise, and that in exacting an exercise tax from their corporations the states are not obliged to impose a fixed sum upon the franchises, or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise or to the result of such exercise. No mode of effecting this, and no forms of expression which have not a meaning beyond this, can be regarded as violating the constitution. A power to tax to this extent may be essential to the healthy existence of the state governments, and the federal constitution ought not to be so construed as to impair, much less destroy, anything that is necessary to their efficient existence." It was accordingly held that the act imposing the tax was not in conflict with the constitution of the United States, and the decision was placed upon two distinct grounds: First, that such a tax is laid upon a fund, which, though in part derived from freight earned, has lost its distinctive character, and has become the property of the company, and has been incorporated with the general mass of its property. The court said upon this point: "There seems to be no stronger reason for denying the power of a state to tax the fruits of such transportation after they have become intermingled with the general property of the carrier than there

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is for denying her power to tax goods which have been transported after their original packages have been broken, and after they have been mixed with the mass of personal property in the country. We think it may be safely laid down that the gross receipts of railroad companies, after they have reached the treasury of the carriers, though they may have been derived in part from transportation of freight between states, have become subject to legitimate taxation. \* \* \* It is not denied that net earnings of such corporations are taxable by state authority without any inquiry after their sources. \* \* \* And net earnings are a part of gross earnings." The analogy here used, we think, has its foundation in the true philosophy of constitutional law, and the reasoning of the court will endure the most searching analysis. The second ground upon which the decision was placed is upon the right of the states—which the court declared to be unquestioned—to tax the franchises of companies created by them; saying: "It is not deniable that gross receipts may be a measure of proximate value, or, if not, at least of the extent of enjoyment. If the tax be in fact laid upon the companies, the adoption of such a measure imposes no greater burden upon any freight or business from which the receipts came than would an equal tax laid upon a direct valuation of the franchise. In both cases the necessity of higher charges to meet the exaction is the same." To this decision, and to the wise and sound construction and logical reasoning by which it is supported, Justices Miller, Fields, and Hunt in vain opposed their adverse views, which, though often repeated elsewhere, have never, in our judgment, been more forcibly expressed than in the dissenting opinion of Justice Miller in that case.

Since the decision in *State v. Philadelphia, W. & B. R. Co.*, 45 Md. 379, it cannot be questioned that the tax in the present case is a franchise tax, measured in amount by the extent of the business of the corporation; the act of 1872 (chapter 234), which was considered in that case, being identical in substance, and very nearly so in language, with the act of 1890, (chapter 559) and the act of 1896 (chapter 120, § 146), now under consideration. The supreme court of the United States has said in *New York, L. & E. R. Co. v. Pennsylvania*, 158 U. S. 435, 436, 15 Sup. Ct. 896, 39 L. Ed. 1043, where the interstate commerce clause of the constitution was invoked without success: "A construction or meaning attributed to the terms of a state statute by the courts of such state will, of course, be adopted by this court when called upon to decide questions arising under such legislation;" and that court must, therefore, if called on to review this decision, assume that this tax is a franchise tax, and upon that assumption determine its constitutionality, in full view of its own numerous decisions upon that point, which may be summarized in the language of Justice Clifford in *Society v. Coite*, 6 Wall. 594, 18 L. Ed. 897, in which he says: "Nothing can be more cer-

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tain in legal decisions than that the privileges and franchises of private corporations may be taxed by a state for the support of the state government." Unless, therefore, the decision in *Re State Tax on Railway Gross Receipts* can be shown to have been overruled, or shall be hereafter overruled on a review of this case, the judgment before us must stand.

The Gross Railway Receipts Tax Case was approved in *Osborne v. Mobile*, supra, sustaining a license tax upon an express business carried on in Mobile, and including transportation beyond the limits of the state; Chief Justice Chase saying: "It comes directly within the rule laid down in the case relating to the tax on the gross receipts of railroads, and is no more a tax upon interstate commerce than a general tax on drayage could be because the licensed drayman might sometimes be employed in hauling goods to vessels to be transported beyond the limits of the state." It was again approved in the case of *In re Delaware Railroad Tax*, 18 Wall. 232, 21 L. Ed. 888, where Justice Field, dealing with a similar statute imposing a tax upon the net earnings of the railroad, said: "The tax imposed by the act in question affects commerce among the states in just the same way, and in no other, that taxation of any kind necessarily increases the expense attendant upon the use or possession of the thing taxed; and a tax upon a corporation may be proportioned to the income received, as well as to the value of the franchise granted, or the property possessed." The exercise of the authority which every state possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business and income, or the value of their property, when this is not done by discriminating against rights held in other states, "and the tax is not on imports, exports, or tonnage, or transportation to other states, cannot be regarded as conflicting with any constitutional power of congress." The Gross Receipts Case has also been approved in numerous subsequent decisions of the supreme court of the United States, to which reference here is unnecessary.

We shall not attempt to review all the cases cited by the appellant in support of his contention, but will refer briefly to a class of those cases which we think can be broadly discriminated, before we take up the cases which it is contended have overruled the Gross Receipts Case. In *Western Union Tel. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067, the precise question was whether the power of the state to tax the occupation of the telegraph company could be exercised by placing a specific tax on each message sent out of the state, or sent by public officers on the business of the United States. An act of congress to facilitate the erection of telegraph lines had authorized the use of public domain, and the military and post roads, and the crossing of the navigable streams and waters of the United States for that purpose, and in return for these

privileges those who avail themselves of it are bound to give the United States precedence in the use of their lines for public business, at rates to be fixed by the postmaster general, thus constituting companies of that class, as to government business, government agencies; and this company had accepted the privileges and obligations of that act. It was held that the tax laid could not be enforced, Chief Justice Waite saying, as to the first point, that the tax was laid on the message itself, the same tax on every message sent, and because it is sent without regard to the distance carried or the price charged, and the tax is in no respect proportioned to the business done. That case was, on that point, thus brought clearly within the principle and the letter of the ruling in the State Freight Tax Case, *supra*. As to the government messages, the tax was also held invalid, because a tax by the state on the means employed by the United States to execute its constitutional powers is void, upon the familiar principle decided in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579. In *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311, the only tax involved was a license tax upon the Western Union Telegraph Company, similar to the license tax in *Osborne v. Mobile*, *supra*, the telegraph company having also accepted the privileges and obligations of the act of congress mentioned in *Western Union Tel. Co. v. Texas*, *supra*, and it was held that such a license tax was invalid; thus overruling, as to ordinary interstate messages, *Osborne v. Mobile*. This overruling of that case must be accepted; but, when the court proceeded to declare that no state can lay a tax on the receipts derived from the subjects of transportation of commerce,—that question being in no wise involved,—its utterance formed no part of its binding or authoritative judgment. In *Western Union Tel. Co. v. Alabama State Board of Assessment*, 132 U. S. 472, 10 Sup. Ct. 161, 33 L. Ed. 409, the statute of Alabama imposed a tax on the gross amounts of the receipts by any and all telegraph companies derived from business done in that state. The company returned only its gross receipts from business wholly within the state, but subsequently, on demand, a further return of its interstate business was made, and the tax was imposed upon the aggregate of both returns. It was held that the statute, thus construed, was a regulation of commerce, and the tax was unconstitutional. It must be noted, however, that in that case the statute made no provision for apportionment of all receipts according to the mileage within and without the state, whereas in *Western Union Tel. Co. v. Attorney General of the Commonwealth of Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790, a similar statute which did make such apportionment was held valid. In all these cases we think the distinction from the present case is too obvious to require further notice.

But the appellant contends that the Gross Receipts Case in 15 Wall. 284, 21 L. Ed. 164, has been overruled in *Fargo v.*

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state fairly and fully what we understand to be the controlling facts, and to make no forced or based deductions therefrom. It is not to be denied that in these and other decisions of the supreme court since the Gross Receipts Case, 15 Wall. 284, 21 L. Ed. 164, there is manifested a tendency to enlarge the authority of the federal government, and to curtail the taxing power of the state, when applied to questions however remotely affecting the subjects of interstate commerce; but, whatever may be thought of the decision in Philadelphia & Southern S. S. Co. v. Pennsylvania, supra, or of the other cases relied on by the appellant as dethroning the authority of the Gross Receipts Case, we regard the case of Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 48 Am. & Eng. R. Cas. 602, 12 Sup. Ct. 121, 163, 35 L. Ed. 994, as necessarily reasserting its authority, and conclusively establishing the validity of the tax now in question. In that case the statutes of Maine required every corporation operating a railroad in the state to pay "an annual excise tax for the privilege of exercising its franchise in the state," and provided that the annual gross transportation receipts should be divided by the number of miles operated, to ascertain the average gross receipts per mile; and that, when a railroad lay partly within and partly without the state, as that railroad did, the gross receipts over the whole line, within and without the state, should be divided by the total number of miles operated, to obtain the average gross receipts per mile; and the gross receipts within the state should be determined by multiplying the general average per mile by the number of miles operated within the state. The attorney general of Maine, in his reported argument, admirable alike for its clearness and condensation, declined to make any general review of the cases bearing upon the general question, and referred only to those closely in point, sustaining his contention, viz. The Gross Receipts Case, 15 Wall. 284, 21 L. Ed. 164, and *In re Delaware Railroad Tax*, supra, and also the two cases there and here relied on as overthrowing the case in 15 Wall., 21 L. Ed., though it is singular that they do not seem to be relied on as in any way assailing the case in 18 Wall., 21 L. Ed., and he apparently succeeded in demonstrating to the satisfaction of a majority of the court that 15 Wall., 21 L. Ed., had not been overruled by 121 U. S., 7 Sup. Ct., 30 L. Ed., or 122 U. S., 7 Sup. Ct., 30 L. Ed., and that its authority was still acknowledged by the court. That opinion was delivered in 1891 by Justice Field, and fully sustained the contention of the state. The court said: "The tax for the collection of which this action is brought is an excise tax upon the defendant corporation for the privilege of exercising its franchise within the state of Maine. It is so declared in the statute which imposes it. And that a tax of this character is within the power of a state to levy there can be no question. The designation is used more frequently in this country in the sense of an impost for a license to exercise particular fran-

chises than in any other sense. The privilege of exercising the franchise of a corporation within a state is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the state, whether the corporation be of domestic or foreign origin, it may be enforced upon such conditions, whether pecuniary or otherwise, as the state, in its judgment, may deem most conclusive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax or its validity is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the state in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the state and the corporation taxed. \* \* \* A resort to the receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. \* \* \* The case of *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200, in no way conflicts with this decision; nor do the views we hold in this case in any way qualify or impair that decision." If this is not a confirmation of the authority of 15 and 18 Wall., we are at a loss to understand the force of plain language, and we regard the *Maine* case as a clear indication on the part of the court that the extreme limit of expansion of federal authority in that direction had been reached in the *Philadelphia Steamship Case*, and as a further indication that they meant to say in the *Gross Receipts Case* what they said in the *Maine case*, regardless of any apparent intimations to the contrary in the intervening period. They could not logically sustain the *Maine* statute while upholding the *Steamship Case* without recognizing the distinction between that case and those in 15 and 18 Wall., which we have already drawn in the discussion of those cases. But if we should believe, with Justice Bradley in his dissenting opinion in the *Maine case*, that it overrules the *Steamship Case*, then there is an end of all argument, and we rest securely upon the *Gross Receipts Case*. The *Maine case* is the latest upon the point, and its principles have been approved by the

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supreme court in numerous decisions; notably in *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 440, 15 Sup. Ct. 900, 39 L. Ed. 1046, and its exact doctrine reannounced in *Horn Silver-Min. Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164, and *Express Co. v. Ohio State Auditor*, 165 U. S. 220, 17 Sup. Ct. 305, 41 L. Ed. 683. If, in the Maine case, the court, in response to the argument of the state, based confessedly upon the continued authority of the Gross Receipts Case and the Delaware Railroad Tax Case, as announcing the same doctrine, had chosen plainly to overrule those cases, or without saying in plain words how much authority they should continue to have, and had struck down the Maine statute, in one case it would have been, and in the other it possibly might have been, our duty to follow its action in that case, though some of our own decisions might still be formally in the way. But, understanding the Maine case as we do, and being profoundly impressed with the absolute soundness of the principles announced in the Gross Receipts Case, and approved in the Maine case, we are bound in duty to the state to uphold the tax in question, leaving it to the supreme court to say, if invoked whether we have misinterpreted their meaning.

The legality and propriety of the mileage method of measuring the value of a franchise tax, otherwise valid, has been so repeatedly declared, and so emphatically stated in the Maine case, that we shall not refer to any other authority.

Under sections 6, 7, c. 559, Laws 1890, which regulated proceedings for recovery of all these taxes, they are due and payable July 1st in each year, and, if not paid within 30 days thereafter, the corporation is to forfeit and to pay to the state an additional amount of 5 per cent. as penalty or damages, to be added to such taxes so due and unpaid; and, if judgment is rendered for the state in any suit to recover such taxes, judgment is to be entered without stay for the amount of taxes so due, and the 5 per cent. additional as damages, with interest and costs. This it was clearly within the power of the legislature to provide. We think the interest was correctly charged from the 1st of August only, as suit was only authorized after that time, and no interest is allowable on the 5 per cent. penalty or damages.

It follows, from what we have said, that the plaintiff's prayer was properly granted and the defendant's six prayers were properly rejected, and the judgment will therefore be affirmed. Judgment affirmed, with costs above and below.

## NOTES.

**Railroads—Taxation of Gross Receipts—Whether Interference with Interstate Commerce.**—The principal case seems to be directly in line with the latest decision on the subject handed down by the supreme



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court of the United States, *State of Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 12 Sup. Ct. Rep. 121, 163, 35 L. Ed. 994, 48 Am. & Eng. R. Cas. 602, where it was held that a state may, without transgressing the commerce clause of the federal constitution, require every corporation or person operating a railroad within its limits to pay an annual excise tax for the privilege of exercising its franchise, to be determined by the amount of its gross transportation receipts, and may apply such a law to railroads lying partly within and partly without the state, or to one operated as a line or system extending beyond the state, by providing that the tax in such case shall be equal to the proportion of the gross receipts in the state, to be ascertained in a manner provided by the law.

The Maine statute provided that when "a railroad lies partly within and partly without this state, or is operated as a part of a line or system extending beyond this state, the tax shall be equal to the same proportion of the gross receipts in this state, as herein provided, and its amount determined as follows: The gross transportation receipts of such railroad, line, or system, as the case may be, over its whole extent, within and without the state, shall be divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in this state shall be taken to be the average gross receipts per mile, multiplied by the number of miles operated within this state."

We have concluded that the able dissenting opinion in *State of Maine v. Grand Trunk R. Co.*, *supra*, is the most valuable authority opposed to the principal case that can be given.

**Dissenting Opinion.**—BRADLEY, J. (dissenting).—JUSTICES HARLAN, LAMAR, BROWN, and myself dissent from the judgment of the court in this case. We do so both on principle and authority. On principle, because, while the purpose of the law professes to be to lay a tax upon the foreign company for the privilege of exercising its franchise in the state of Maine, the mode of doing this is unconstitutional. The mode adopted is the laying of a tax on the gross receipts of the company, and these receipts of course include receipts for interstate and international transportation between other states and Maine, and between Canada and the United States. Now if, after the previous legislation which has been adopted with regard to admitting the company to carry on business within the state, the legislature has still the right to tax it for the exercise of its franchises, it should do so in a constitutional manner, and not (as it has done) by a tax on the receipts derived from interstate and international transportation. The power to regulate commerce among the several states (except as to matters merely local) is just as exclusive a power in congress as is the power to regulate commerce with foreign nations and with the Indian tribes. It is given in the same clause, and couched in the same phraseology; but if it may be exercised by the states it might as well be expunged from the constitution. We think it a power not only granted to be exercised, but that it is of first importance, being one of the principal moving causes of the adoption of the constitution. The disputes between the different states in reference to interstate facilities of intercourse, and the discriminations adopted to favor each their own maritime cities, produced a state of things almost

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intolerable to be borne. But, passing this by, the decisions of this court for a number of years past have settled the principle that taxation (which is a mode of regulation) of interstate commerce, or of the revenues derived therefrom (which is the same thing), is contrary to the constitution. Going no further back than *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 24 Am. & Eng. R. Cas. 511, we find that principle laid down. There a privilege tax was imposed upon Pullman's Palace-Car Company, by general legislation, it is true, but applied to the company, of \$50 per annum on every sleeping car going through the state. It was well known, and appeared by the record, that every sleeping car going through the state carried passengers from Ohio and other northern states to Alabama and *vice versa*, and we held that Tennessee had no right to tax those cars. It was the same thing as if they had taxed the amount derived from the passengers in the cars. So, also, in the case of *Leloup v. Port of Mobile*, 127 U. S. 640, 21 Am. & Eng. Corp. Cas. 26, we held that the receipts derived by the telegraph company from messages sent from one state to another could not be taxed. So in the case of *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 45 Am. & Eng. R. Cas. 9, where the railroad was a link in a through line by which passengers and freight were carried into other states, the company was held to be engaged in the business of interstate commerce, and could not be taxed for the privilege of keeping an office in the state. And in the case of *Crutcher v. Kentucky*, 141 U. S. 47, 46 Am. & Eng. R. Cas. 637, we held that the taxation of an express company for doing an express business between different states was unconstitutional and void. And in the case of *Philadelphia & S. Steamship Co. v. Pennsylvania*, 122 U. S. 326, 18 Am. & Eng. Corp. Cas. 1, we held that a tax upon the gross receipts of the company was void, because they were derived from interstate and foreign commerce.

A great many other cases might be referred to showing that in the decisions and opinions of this court this kind of taxation is unconstitutional and void. We think that the present decision is a departure from the line of these decisions. The tax, it is true, is called a "tax on a franchise." It is so called, but what is it in fact? It is a tax on the receipts of the company derived from international transportation. This court and some of the state courts have gone a great length in sustaining various forms of taxes upon corporations. The train of reasoning upon which it is founded may be questionable. A corporation, according to this class of decisions, may be taxed several times over. It may be taxed for its charter, for its franchises, for the privilege of carrying on its business; it may be taxed on its capital, and it may be taxed on its property. Each of these taxations may be carried to the full amount of the property of the company. I do not know that jealousy of corporate institutions could be carried much further. This court held that the taxation of the capital stock of the Western Union Telegraph Co. in Massachusetts, graduated according to the mileage of lines in that state compared with the lines in all the states, was nothing but a taxation upon the property of the company; yet it was in terms a tax upon its capital stock, and might as well have been a tax upon its gross receipts. By the present decision it is held that taxation may be imposed upon the gross receipts of the company for the

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exercise of its franchise within the state, if graduated according to the number of miles that the road runs in the state. Then it comes to this: A state may tax a railroad company upon its gross receipts in proportion to the number of miles run within the state as a tax on its property, and may also lay a tax upon these same gross receipts in proportion to the same number of miles for the privilege of exercising its franchise in the state! I do not know what else it may not tax the gross receipts for. If the interstate commerce of the country is not or will not be handicapped by this course of decision, I do not understand the ordinary principles which govern human conduct. We dissent from the opinion of the court.

**Vermont Decision.**—A state statute (Acts Vt. 1882, No. 1, §§ 1, 11, 12), imposing a tax on the entire gross earnings of all railroads operated in the state, and providing that if a railroad be situated partly within, and partly without the state, the tax shall be proportionate to the mileage of trains run within the state, constitutes an interference with interstate commerce, and is unconstitutional and void. *Vermont & Canada R. Co. v. Vermont C. R. Co.* (Vt.), 46 Am. & Eng. R. Cas. 646.

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v.

## ATLANTIC COAST-LINE R. CO. OF SOUTH CAROLINA.

*(Supreme Court of South Carolina, April 9, 1901.)*

[38 S. E. 416.]

**Killing of Passenger—Negligence—Pleading—Previous Acts of Carelessness.\***—A complaint in an action against a railroad for the negligent killing of a passenger alleged that, during 10 days before the accident occurred, a conductor repeatedly ran one portion of a train violently against the other without due regard to the lives and safety of passengers; that the conductor was warned that, unless more care were taken in bringing the portions of the train together, some passenger would be seriously injured; and that, notwithstanding such warning, a portion of the train was run against another portion thereof, and the plaintiff's deceased thereby sustained injuries resulting in her death. *Held*, that the allegations as to what occurred within 10 days before the accident should not be stricken out as irrelevant, since they tended to show gross negligence.

**Appeal—Correct Ruling—Unsound Reason.**—Where a trial judge gave an unsound reason for a correct ruling in an action against a railroad for the negligent killing of a passenger, the ruling would not, therefore, be disturbed on appeal.

**Damages—Evidence—Suffering of Deceased—Grief of Beneficiaries.**—In an action against a railroad for the negligent killing of a passen-

\*See generally, *Missouri, K. & T. Ry. Co. v. Johnson* (Tex.), 12 Am. & Eng. R. Cas., N. S., 824, and *note*, 828 *et seq.*; *Central of Georgia Ry. Co. v. Ross* (Ga.), 14 Am. & Eng. R. Cas., N. S., 12, and *note*, 16.

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ger. the admission of the testimony of deceased's daughter as to the suffering deceased endured by reason of the injuries complained of, and the effect of such suffering on the witness, was rendered harmless by a positive instruction that the jury could not consider as an element of damages either the suffering of deceased or the grief of the beneficiaries, or any of them, occasioned by witnessing such suffering.

Appeal from common pleas circuit court of Sumter county;  
D. A. Townsend, Judge.

Action by A. Brooks Stuckey, administrator of Sarah P. Dixon, against the Atlantic Coast-Line Railroad Company of South Carolina. From a judgment for plaintiff, defendant appeals. Affirmed.

The following is the charge of the court:

"Mr. Foreman and Gentlemen of the Jury: This case has taken some time, and you have listened to it with commendable patience, and I thank you for the careful attention you have given to it, and I hope you now remember the facts of the case, because in charging you I cannot allude to the facts. You are the sole judges of the facts, and hence I have only to give you my view of the law, and you are to apply it to the facts of the case, and find your verdict. In doing so, you are to be governed by the preponderance of the evidence. In the criminal court the plaintiff has to make out his case beyond all reasonable doubt, but in the court of common pleas the jury are to be governed by the preponderance of the evidence; that is, the greater weight. Weigh all the evidence, and see which preponderates, and according to the preponderance of the evidence give your verdict. The title of the case is 'A. B. Stuckey, as Administrator, against the Atlantic Coast-Line Railroad Company.' That is the title of the case. The action is brought for damages which are alleged to have resulted to the children of Mrs. Dixon by reason of her death, and the charge in the complaint is that her death was caused by the negligence of the railroad company. I don't mean to indicate to you how much of the charge has been proven, or whether any of it has been proven or not. I simply said that is the substance of the charge, and you will find it in the complaint, and you will have the complaint, and will see it in there, and you will also have the answer, and see that it denies that the death of Mrs. Dixon resulted from any negligent act of theirs. The case has been conducted ably on both sides, and able arguments have been made by both counsel. I shall detain you a very short time, because counsel on both sides have been kind enough to embrace what they consider the law in short, terse sentences, as they see it. They have written it down deliberately, quietly, and in short sentences, and I will say mostly what I have to say in connection with those sentences.

"The statute under which this suit is brought reads as follows: 'Whenever the death of a person shall be caused by the

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wrongful act, neglect or default of another, and the act, neglect or default is such as would if the death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person or corporation, who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony.' And the second section is: 'Every such action shall be for the benefit of the wife, husband, parent and children of the person whose death shall have been so caused, and if there be none such, then for the benefit of the heirs at law or distributees of the person whose death shall have been so caused as may be dependent for a support and shall be brought by or in the name of the executor or administrator of such person. And in every such action, the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively for whom, and for whose benefit, such action shall be brought; and the amount so recovered shall be divided among the before mentioned parties in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate.'

"Notice the words now, 'Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof.' If you come to the conclusion that the death of the lady named in the complaint did not result from any negligent act of the railroad company, then that would settle the matter at once. In all avocations of life, certain duties devolve upon us, no matter what they are. There is no vocation in life in which human beings move where we are completely relieved from responsibility, if they have any connection, relations, or business transactions with their fellow men. So there are certain duties devolving upon the railroad company and certain duties devolving upon those who travel on the railroad company's trains. Proper care must be used also in transacting any business, and proper care is such care as a prudent person would observe in doing the same thing. There is a good definition here in two of the requests to charge, one of which is, "'Negligence' is the absence of due care." It is the duty of every one, I said, to observe that care which an ordinarily prudent person would do, in doing the same thing,—that is, proper care,—and, if that care is not observed, that is negligence. 'Negligence is the absence of due care.' Another definition: 'Negligence' is defined to be 'the failure to do what a reasonable and prudent person would ordinarily have done in a certain situation, or doing what an ordinarily prudent person would not have done.' That is the charge here;

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that by the negligence of the railroad company this lady was injured so that she died.

"I shall take up the requests to charge, and discuss them, and I will have more to say to you in connection with them. I think usually the defendant's requests come first, and the plaintiff's last.

"The defendant requests me to charge you this:

"First. If the jury believe that the train was properly equipped, and there was no greater force or violence used than was necessary to make a coupling of the train upon which Mrs. Dixon was riding, the plaintiff cannot recover, for the reason that when Mrs. Dixon boarded the train she assumed all the risks incident to the proper handling of such train.' I charge you that. I am aware of the fact that the utmost care must be observed by a railroad company in transporting passengers, but the kind of train must be considered. While a person voluntarily boards a train, still the railroad company must observe the utmost care. That must be considered in connection with the transportation, whether it be a passenger train, a mixed or freight train.

"Second. There cannot be a verdict against the railroad company unless the plaintiff failed to exercise the degree of care required by law in such cases, and negligence is the absence of due care, and before the jury can find a verdict for the plaintiff it must be satisfied by the preponderance of the evidence—First, that the jar from the coupling was the proximate cause of Mrs. Dixon's death; second, that such jar was the result of the want of proper care in the handling of such a train.' I charge you that.

"The third is in relation to the feelings,—wounded feelings, first clause. 'If you find that the plaintiff is entitled to recover, your verdict will be for such an amount as will compensate those entitled thereto in proportion to the injuries received by the death of Mrs. Dixon.' Second clause: 'You cannot take into consideration, in the estimation of damages in this case, the wounded feelings of the beneficiaries,—their distress or grief. That is not what the law intends by the injuries, nor can you give damages for the sorrow they may feel for the loss of their mother. You are not to go into speculation over these matters, but are to form a deliberate and candid judgment from the facts as proven.' I cannot charge you that. The first part of it contains the general law as I understand it, 'If you find that the plaintiff is entitled to recover, your verdict will be for such an amount as will compensate those entitled thereto, in proportion to the injuries received by the death of Mrs. Dixon;' but I cannot charge you that you are not to take into consideration the wounded feelings and sorrow, etc. I charge you that you may consider the grief and sorrow, provided you find that such produces an injury, because the statute says that such damage may be given as is proportioned to the injury which resulted

from that sorrow; so then you may consider that in arriving at your verdict.

" 'Fourth. The jury cannot consider as an element of damage the grief which has been suffered on account of the death of Mrs. Dixon by the persons for whose benefit the action is brought.' I take that to be the same. I don't see any difference. I cannot charge it as it is. I charge you you may take it into consideration, if you find there was grief and it produced an injury.

" 'Fifth. No matter how much Mrs. Dixon, the deceased, may have suffered from the time of the alleged injury to the time of her death, this is not a proper element of damage, and the jury cannot take that into consideration in making up its verdict.' I charge you that no matter how much she suffered you cannot consider her suffering as a part in making up your verdict as to damages.

" 'Sixth. In an action of this kind, if the jury comes to the conclusion that the plaintiff should recover at all, it cannot give damages to punish the railroad company for its carelessness or recklessness, even should the jury conclude that the railroad company was careless or reckless.' I understand that to be punitive damages, and I charge you that proposition understanding it to mean punitive damages. I will explain: If I should injure your horse ten dollars' worth, that would be actual damage; and, if you sue me to get ten dollars, that would be actual damages. If I did it in a malicious manner, then that would subject you to punitive damages,—that is, punishing damages; but in a case like this you cannot give punishing damages. You can give compensatory damages, provided you find there is liability for damages at all. You may give compensatory damages, but not punishing damages.

" 'Seventh. The statute allowing one to sue for damages in an action of this kind limits the action to the recovery of such damages as are by way of recompense or compensation for injuries sustained by Mrs. Dixon's death, and while it does not limit the damage to the pecuniary loss alone of the beneficiaries, and while the jury may give such damages as they may think proportionate to the injury, yet they can give only such damages as will be proportionate to the injury, and compensate for injury actually sustained by Mrs. Dixon's death, and they must be established by the evidence in the case.' I charge you that.

" 'Eighth. I charge you this: 'The jury cannot take as an element of damage the grief suffered by the children of Mrs. Dixon, or any of them, occasioned by witnessing her suffering.' I charge you that.

" 'The plaintiff's requests to charge are as follows:

" '(1) Negligence is the absence of due care.' I charge you that.

" '(2) "Negligence" is a relative term, and its existence depends upon the requirements of the occasion.' I charge you that.

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“(3) When a passenger is injured on a railroad there is from that fact alone prima facie evidence of negligence in the management of the road, which evidence the railroad company is bound to rebut.’ I charge you that that has been recently decided in one of our cases.

“(4) The measure of damage is not the pecuniary loss alone of the beneficiaries, if they are entitled to damages at all, but the jury may give such damages as they may think proportionate to the injury, whether pecuniary or otherwise, sustained by the beneficiaries; for it is obvious that such injury may be far beyond any mere pecuniary loss.’ I charge you that.

“(5) The jury, in determining what amount, if any, will be proportionate to the injury resulting to the beneficiaries from the death of their relative, are not confined to the consideration of pecuniary loss alone sustained, but may and should consider any other injury, whatever may be its character, in ascertaining the proportion contemplated by the statute.’ I charge you that.

“(6) The plaintiff does not ask nor is the jury authorized to give punitive, exemplary, or vindictive damages as a punishment to the railroad company, or as an example of the danger attending wrongdoing, but may give such damages as they may think proportioned to the injury resulting from such death to the parties, if they believe from the evidence that the deceased was negligently killed by the defendant.’ I charge you that, as I have charged you previously.

“(7) Carriers of passengers for hire are required to give the highest degree of care and are responsible for the smallest negligence.’ I charge you that, and I will say in connection there that it means the highest degree of care under the circumstances, and in considering that matter you must consider what kind of conveyance, whether a passenger train, a mixed train, or a freight train. If a passenger voluntarily goes upon the train, then, while it is the duty of the railroad company to observe the highest care, it means the highest care under the circumstances, and you must take into consideration in that connection whether it is a passenger train, mixed train, or freight train. Those are all of the requests to charge so far, unless there are others. I don’t think I will say more to you, gentlemen of the jury. As I have said, you will be governed by the preponderance of the evidence. If you find for the plaintiff, you will say: ‘We find for the plaintiff so many dollars,’—writing it out,—don’t use figures,—and the foreman will sign his name to the verdict. If you find the plaintiff is not entitled to recover, the form of your verdict will be, ‘We find for the defendant.’”

The following are the exceptions filed:

“(1) Because his honor, Judge Buchanan, erred in refusing to grant an order to strike out the fifth paragraph of the complaint, it being submitted as error that the alleged acts of neg-



ligence on previous occasions to that out of which it is alleged the injury grew could not be offered in evidence in support of the negligence of the defendant at the time of the injury, and that the same could not be pleaded or proven, and also committed error in holding that paragraph 5 of the complaint was in effect an allegation that the defendant, with 'knowledge or information sufficient to put them on notice, and inform them of the disqualification and incompetence of the servants, continued them in their employment'; there being no allegation that the injury to Mrs. Dixon was caused by reason of the incompetency of the defendant's servants in charge of the train.

"(2) Because his honor, Judge D. A. Townsend, erred in allowing so much of the testimony of W. R. Law as follows to be submitted to the jury, namely: 'Q. What was the effect, so far as you saw, that day,—the effect of the jar on you? A. I do not know that I would have felt it so sensibly, but I was right sick,—feeling very badly. I had just gotten out of bed the day before, but it jarred me pretty badly,—jarred the back of my neck. I was leaning on the seat, and that is one reason I felt it,'—it being respectfully submitted that such testimony had no relation to the alleged act of negligence from which the injury complained of in the complaint grew, and did not even tend to support the view of Judge Buchanan that paragraph 5 of the complaint charges the defendant with retaining negligent servants in its employment.

"(3) Because his honor, Judge Townsend, erred, as a matter of law, in holding, in reference to such testimony of W. R. Law, that he could not express an opinion on this evidence, for the reason that it had been passed upon by the order of Judge Buchanan, and he could not rule upon it, and in holding that it was *res judicata*, so far as he was concerned, and in holding that, inasmuch as Judge Buchanan had ruled upon the question, he was to say 'that the testimony which is necessary to come in is relevant'; and in holding, 'I simply say that I have to rule this testimony in because I do not think that it is a question for me,'—for it was the duty of his honor, Judge Townsend, not only to construe the pleading, but to pass upon every question as to its pertinency and relevancy, and particularly upon the pertinency and relevancy of the question and answer above referred to, and he erred as a matter of law in holding that he had no power to consider the question.

"(4) Because his honor, Judge Townsend, erred in allowing the following questions put to the witness B. A. Pressley to be asked and answered: 'Q. Have you ever ridden on the train from here to Bishopville? A. Yes, sir. Q. You remember having been on that train any time during the year 1898? A. Yes, sir. Q. You remember if you were ever on that train at any time when there was any jar or shock produced by a collision of the cars? A. I was at Elliott's, and, the

weather being very warm, I was standing in the rear door of the coach, and they came back with such force that they came very near knocking me out, and it ran thirty or forty yards before it stopped. Q. Elliott's is a station on this road? A. Yes, sir. Q. And this was done while coupling the cars together? A. Yes, sir. Q. Did you ever speak to any of the railroad officials about this violent coupling at Elliott's? A. I spoke to Capt. Welch, and told him he ought to caution Mr. Collins to be more careful; that when they came back to couple to the passenger coach there might be an accident, '—it being error, it is respectfully submitted, to allow these questions to be asked and answered concerning the alleged negligent acts of the defendant on a different occasion from the time of the alleged act of negligence complained of in the complaint and upon which this action is brought, and the same is not relevant.

"(5) Because it is respectfully submitted there was error on the part of his honor, Judge Townsend, in admitting the following questions to be asked of the witness R. E. Carnes, and in allowing him to answer same, namely: 'Q. Were you ever on the train when there was any violent coupling? A. Yes, sir. Q. Were you ever on the train and saw a violent coupling? If so, please tell what the result of it was. A. Yes, sir, on many occasions,'—because the alleged acts of negligence formed no part of the plaintiff's cause of action, the question before the court being as to whether the defendant was guilty of negligence at the time of the alleged injury to Mrs. Dixon, and did not even tend to support the view of Judge Buchanan that paragraph 5 of the complaint charges the defendant with retaining negligent servants in its employment.

"(6) Because his honor, Judge Townsend, erred in admitting the following questions to be asked of Mrs. A. R. Kelly, and in permitting her to answer same, over defendant's objection, namely: 'Q. Did your mother suffer much or little during her illness? A. She suffered a great deal. I do not think there ever was greater suffering than she suffered. Q. Was that suffering of any consequence to you? Q. Mr. Fraser: Was the suffering of your mother of any consequence to you? A. Yes, sir; I suffered a great deal from it. Q. Has the death of your mother been of any consequence to you? A. Yes, sir. Q. Could any amount of money be full compensation to you? A. No, sir; never could be compensated,'—in that the suffering of Mrs. Dixon formed no part of the cause of action of the plaintiff. "(7) (a) Because his honor erred in refusing to charge the second clause of the third request presented by the defendant, as follows: 'You cannot take into consideration, in the estimation of damages in this case, the wounded feelings of the beneficiaries, their distress or grief. That is not what the law intends by the injuries, nor can you give damages for the sorrow they may feel for the loss of their

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mother. You are not to go into speculation over these matters, but are to form a deliberate and candid judgment from the facts as proven,'—in that the wounded feelings of the beneficiaries, their distress, sorrow, or grief, which they may have felt or may feel for the loss of their mother, Mrs. Sarah P. Dixon, are not proper elements of damage in an action of this kind, and, apart from physical injury, cannot form a basis upon which to give damages. (b) Because his honor erred in charging in relation to the said second clause of the third exception above recited, as follows, namely: 'I cannot charge you that. \* \* \* But I cannot charge you that you are not to take into consideration the wounded feelings and sorrow, etc. I charge you that you may consider the grief and sorrow, provided you find that such produced an injury, because the statute says that such damages may be given as are proportioned to the injury which resulted from that sorrow; so, then, you may consider that in arriving at your verdict,'—in that the statute does not provide for the giving of damages for sorrow, nor for injury to wounded feelings, nor for sorrow and grief, and his honor should have so instructed the jury, and should have instructed the jury that no such damages could be given in this case; there being no allegation or evidence of physical injury, there was nothing on which to base his charge that they could consider grief and sorrow, if they found that such produced an injury.

"(8) Because his honor erred in refusing to charge the fourth request of the defendant, namely: 'The jury cannot consider as an element of damage the grief which has been suffered on account of the death of Mrs. Dixon to the persons for whose benefit the action has been brought;' and erred in charging in relation thereto: 'I take that to be the same. I cannot see any difference. I cannot charge it as it is. I charge you, you may take it into consideration if you find there was grief and it produced an injury,'—in that the grief which the beneficiaries may have suffered is of too vague, uncertain, and shadowy a character of itself to form the basis of an injury, apart from physical or bodily injury, and there was no allegation in the complaint that any such bodily or physical injury was suffered by the beneficiaries, and no proof whatever that they suffered any such injury, and there was nothing upon which to base the charge to the jury that they could give damages for the grief of the beneficiaries; and, in the absence of any allegation or proof that the beneficiaries suffered any bodily injury, his honor's charge to the jury, 'if you find there was grief and it produced an injury,' led the jury to believe that they could give damages for grief alone, and led them to believe that the whole matter was in their discretion, without any rule of law in regard to the same.

"(9) Because his honor erred in instructing the jury, at the request of the plaintiff, as follows: 'The jury in determining what amount, if any, will be proportionate to the injury re-

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sulting to the beneficiaries from the death of their relative, are not confined to the consideration of pecuniary loss alone sustained, but may and should consider any other injury, whatever may be its character, in ascertaining the proportion contemplated by the statute,'—inasmuch as such charge, unexplained, under the facts of the case, was calculated to lead the jury to believe that they could give damages for the wounded feelings of the beneficiaries, since his honor had charged in relation to the defendant's third request, before that time, in the following language: 'The third is in relation to the feelings,—wounded feelings;' and had charged the jury that they might give damages for same if they found that it produced an injury, without explaining what kind of injuries were contemplated by the statute; it being respectfully submitted that it was the duty of the court to construe the law, and not leave the same to be interpreted by the jury, in its discretion.

"(10) Because his honor, Judge Townsend, erred, as a matter of law, in refusing to set aside the verdict and grant a new trial, in that—First. His honor permitted the testimony of Mrs. A. R. Kelly, which is set out in the grounds of motion for a new trial, to be submitted to the jury over the defendant's objection, and allowed the jury to consider from her testimony the alleged suffering of Mrs. Dixon as an element of damage in the behalf of Mrs. Kelly and the other beneficiaries, when the same formed no part of the elements of damage in the case. Second. His honor erred in refusing to sustain the exceptions made to his charge, set out in the grounds of motion for a new trial in the record herein, reference to which is here made, on said motion, and particularly so much of his charge as instructed the jury that they could give damages for distress, sorrow, grief, and wounded feelings of the beneficiaries, all of which was called to his attention on said motion, and he should have granted a new trial on said exceptions, there being no evidence whatever to support any of said alleged elements of damage."

J. T. Barron and Purdy & Reynolds, for appellant.

Frasers & Cooper and Thos. S. Moorman, for respondent.

McIver, C. J. This action was brought by the plaintiff and administrator of Sarah P. Dixon, deceased, against the Atlantic Coast-Line Railroad Company of South Carolina, to recover damages for the alleged negligent killing of his intestate by the defendant company, for the benefit of the children of the deceased, under the provisions of an act usually designated as "Lord Campbell's Act," incorporated as sections 2315-2318 of the Revised Statutes of 1893.

It appears from the "case" that a motion was made before his honor, Judge Buchanan, by the defendant company to strike out paragraph 5 of the complaint, upon the ground that the allegations therein contained were irrelevant to the case as

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made by the complaint. This motion was refused, which was duly excepted to by defendant company, and notice of intention to appeal therefrom upon the rendition of the final judgment. Subsequently thereto the defendant company filed its answer, in which, "protesting against being required to join issue upon allegations contained in paragraph 5 thereof [the complaint], and reserving the right to object to all the testimony relating thereto, it denies all truth of the allegations contained in said paragraph 5 thereof." The case came on for trial before his honor, Judge Townsend, and a jury, and, a verdict having been rendered in favor of the plaintiff, the defendant moved for a new trial on the minutes, which was refused, and defendant gave notice of intention to appeal from the judgment entered upon the verdict, as well as from the order of Judge Buchanan, above referred to, and the order of Judge Townsend refusing the motion for a new trial upon the minutes, upon the exceptions set out in the record, which, together with the charge of the circuit judge, should be reported with this case.

These exceptions substantially raise the following questions:

(1) Whether there was error on the part of Judge Buchanan in refusing the motion to strike out paragraph 5 of the complaint; (2) whether there was error on the part of Judge Townsend in his ruling as to the admissibility of certain testimony; (3) whether there was error in the charge to the jury, either of omission or commission.

For a proper understanding of the first question, it will be necessary to set out paragraph 5 of the complaint, as well as to state the nature of the case as made by the complaint. So much of the allegations as are pertinent to this immediate inquiry may be substantially stated as follows: That on the 1st of October, 1898, plaintiff's intestate purchased a ticket from Sumter to Bell's Crossing, and boarded the defendant's train at Sumter as a passenger, to be carried to Bell's Crossing; that when the train reached Bishopville, a railroad station between the city of Sumter and Bell's Crossing, the forward portion of the train attached to the engine was separated from the passenger coach in which intestate was seated, and the same was left standing on the main track while the other portion of the train, to which the engine was attached, was moved off to a side track; and that, when the engine was brought back on the main track for the purpose of being coupled to the passenger coach, it was run back so rapidly, and with such great force and violence, as to throw the intestate upon the floor of the coach, whereby she sustained serious bodily injuries, which resulted in her death on the 6th day of November, 1898. Paragraph 5 of the complaint reads as follows: "That plaintiff is informed and believes that from time to time, for ten days before the said collision at Bishopville, on the said 1st day of October, 1898, a portion of said train to which the engine was attached had been, negligently

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and without due regard to the lives and safety of the passengers on said train, run against that portion of said train to which the passenger coach was attached, and the conductor of said train of cars has been warned by a passenger on said train, on or about the 21st day of September, 1898, that, unless more care was taken by his engineer in striking the said two portions of said train together, some passenger would be seriously injured; that, notwithstanding such warning, the portion of the train to which the engine was attached was run against the portion of the train to which the passenger train was attached on the said 1st day of October, 1898, as above referred to." It seems to us that these allegations were not irrelevant to the case as made by the complaint, for if true they tended to show that the very thing which it was alleged caused the injury complained of in the case had been called to the attention of the conductor, but a few days before, as dangerous, and that, notwithstanding such warning, a few days afterwards the disaster complained of did occur from the very same cause which the conductor had been warned was likely to produce such a result. We do not think that there was any error on the part of Judge Buchanan in refusing the motion to strike out the fifth paragraph of the complaint for irrelevancy. The first exception is overruled.

Proceeding, then, to the second general question as to errors in the ruling as to the competency of testimony: The second, third, fourth, and fifth exceptions are based upon objections to the testimony of the witnesses W. R. Law, B. A. Pressley, and R. E. Carnes, who were offered to sustain the allegations of paragraph 5 of the complaint, and what we have already said in considering the first exception is sufficient to dispose of these exceptions; for, if the allegations in that paragraph are pertinent to the issue, then, of course, any testimony (otherwise competent) tending to sustain such allegations would be competent,—that is to say, could not be held irrelevant. We may add, however, in reference to the third exception, that, even if the circuit judge did give an unsound reason for his ruling (as to which we need not inquire), that would not affect the question; for, as has been frequently held, the question for this court is whether the ruling of judgment appealed from is right, and not whether the reasons given for such ruling or judgment are sound. And as to the fifth exception we may add that, when it was developed that the testimony of the witness Carnes, as to violent shocks in coupling cars, did not relate to occurrences within the 10 days mentioned in the fifth paragraph of the complaint, that portion of his testimony was ruled out. Exceptions 2, 3, 4, and 5 are overruled.

The sixth exception imputes error in allowing the witness Mrs. Kelly, a daughter of the deceased, to testify as to the suffering her mother endured by reason of the injuries she

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received, and the effect of such suffering upon the witness, upon the ground "that the suffering of Mrs. Dixon formed no part of the cause of action of the plaintiff." While it is true that the circuit judge did, in the first instance, overrule this objection, yet such error (assuming it to have been an error) was rendered absolutely harmless by the positive instruction given to the jury that they could not consider, as an element of the damages in this case, either the sufferings of the deceased, or the grief of the beneficiaries, or any one of them, occasioned by witnessing such suffering; for the circuit judge expressly charged defendant's fifth request, which was as follows: "No matter how much Mrs. Dixon, the deceased, may have suffered from the time of the alleged injury to the time of her death, this is not a proper element of damage, and the jury cannot take that into consideration in making up its verdict." And he emphasized this instruction by adding the following words: "I charge that, no matter how much she suffered, you cannot consider her suffering as a part in making up your verdict as to damages." And he also charged defendant's eighth request, in these words: "The jury cannot take as an element of damage the grief suffered by the children of Mrs. Dixon, or any of them, occasioned by witnessing her suffering." So that, even conceding that there was error in the ruling as to the admissibility of the testimony of Mrs. Kelly, such error was rendered entirely harmless by these explicit instructions of the jury.

Exceptions 7, 8, and 9 will be considered together, as they all impute error to the circuit judge—to use the language of counsel for appellant in his argument here—"in refusing to charge the jury that they could not take into consideration the wounded feelings of the beneficiaries, their grief and sorrow, and in charging them that the jury might take them into consideration, if they found that there was grief and that it produced an injury." It seems to us that the question presented by these exceptions has been conclusively settled by the views presented in the case of *Nohrden v. Railroad Co.* (S. C.) 37 S. E. 228. But counsel for appellant has, according to the proper practice, asked and obtained leave to review that case; and we have thus had the benefit of a full and elaborate discussion of this question on both sides, to which we have listened with much interest. We must say, however, that we see no reason for departing from the view taken in *Nohrden's Case*, based, as it is, on the express terms of our own statute, as construed in the previous cases of *Petrie*, *Strother*, and the other cases cited in the *Case of Nohrden*, which, carried to their logical conclusion, result in the views presented in the preceding cases, and we do not deem it at all necessary to go over the argument again. Exceptions 7, 8, and 9 are overruled.

The tenth exception, which imputes error to the circuit judge

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in refusing the motion for a new trial on the minutes, is disposed of by what has already been said, and must therefore be overruled.

The judgment of this court is that the judgment of the circuit court be affirmed.

## SOUTHERN RY. CO.

v.

## REAVES.

*(Supreme Court of Alabama, Dec. 20, 1900.)*

[29 So. Rep. 594.]

**Killing Stock at Crossing—Signals—Compliance with Statutes and Freedom from Negligence—Burden of Proof.\***—Under Code, §§ 3440, 3443, requiring a railroad engineer to ring the bell or blow the whistle when approaching a public road crossing and approaching and leaving a station, and providing that, when stock is killed at such places, the burden of proof is on the railroad to show compliance with the statute, and freedom from negligence, the burden is on the railroad to remove the presumption of negligence arising from proof of the killing of plaintiff's mules at or near one of its regular stations, and at or near a public road crossing, with their ownership and value.

**Same—Liability—Sufficiency of Evidence.**—Plaintiff's mules were killed at or near a public road crossing. Defendant's engineer testified that when he first saw the mules they were feeding about 5 feet from the track. Later he testified they were standing about 50 feet from the track, and ran directly towards the track, both jumping on it. Later he testified that the mules threw up their heads, made for the railroad, and jumped on the track, running along in front of the engine, and not along the side of the track. Other evidence tended to show that the mules ran along the side of the track 250 or 300 yards before they attempted to cross, and were killed just as they jumped on the track. The track was straight and unobstructed for a mile or more from where the animals were killed. The train was running from 40 to 50 miles an hour, and the mules might have been seen for half a mile. *Held*, in an action against the railroad for the killing, that the evidence was sufficient to justify a finding for plaintiff.

**Instruction.**—It was proper to refuse to instruct that, if the mules were grazing or standing in a ditch 50 feet or more from the track when they were first discovered, it was not such dangerous proximity to the

\*As to whether the killing of stock on track creates a presumption of negligence, see *Little Rock, etc., Ry. Co. v. Wilson* (Ark.), 14 Am. & Eng. R. Cas., N. S., 32, and *foot-note*; extensive *note*, 11 Am. & Eng. R. Cas., N. S., 851 *et seq.*

As to the rebuttal of the presumption of negligence arising from the killing of stock on track, see *Central of Georgia R. Co. v. Woolsey* (Ga.), 19 Am. & Eng. R. Cas., N. S., 573, and *foot-note*.



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track as required the trainmen to take any notice of them, they could assume that they would not come on the track, and it was only when they made some move, or started towards the track, that any duty was required of the trainmen, since it hypothesized facts not shown in evidence.

Same.—It was proper to refuse to instruct that if, when the engineer first discovered the mules, they were not less than 25 feet from the track, and were grazing or drinking, and not coming towards the track, they were not then in such dangerous proximity as to require the engineer to exercise any efforts to stop the train or frighten the animals away, since it hypothesized facts not in evidence.

Same—Duty of Engineer to Look Out for Cattle near Track.\*—It was proper to refuse to instruct that the evidence was without conflict that the mules were not in dangerous proximity to the track when they were discovered by the men in charge of the train, since it ignored the keeping of a proper lookout by the engineer.

Same.—There being evidence tending to show that the engineer was not keeping a proper lookout, it was proper to refuse to instruct that the evidence was without conflict that the engineer and fireman were keeping a proper lookout.

Same—Duty of Engineer to Look Out for Cattle near Track.—It was proper to refuse to instruct that, when the engineer sees stock by the side of the railroad, and not on the track, it is not incumbent on him, and he is not required, to attempt to stop the train, or frighten the animals away by blowing the whistle or ringing the bell, unless they are so near to the track that they could get thereon ahead of the train, and unless they manifest an inclination to go towards the track, since it is only when the engineer, who is competent, and keeping a steady lookout to discover stock, does not and cannot see the approach of an animal in dangerous proximity to the track that the company is not liable for injuring it.

Same—Same.—It was not error to refuse instructions that, if the engineer was reasonably prudent at the time of the accident in trying to avoid injuring the mules, defendant was not liable, since they ignored a steady lookout by the engineer to discover the animals, and it is not sufficient that he should have been reasonably prudent at the time of the injury.

Same—Cattle near Track—Duty of Engineer.—An instruction having been given that, if the evidence was believed, it must be found that the servants in charge of the engine blew the whistle and rang the bell as the law required, it was proper to refuse an instruction that an engineer, on perceiving an obstruction on the track, is not required to both blow the whistle and ring the bell, but it is sufficient compliance with the law to either blow the whistle or ring the bell, since defendant may have been liable even if the engineer did both.

Same—Weight of Engineer's Testimony.—It was proper to refuse to instruct that the evidence of the engineer should be fairly and impar-

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\*As to whether it is the duty of trainmen to look out for cattle on track, see *Keilbach v. Chicago, M. & St. P. Ry. Co.* (N. Dak.), 14 Am. & Eng. R. Cas., N. S., 28, and *note*, 30.

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tially weighed by his intelligence, his manner, the consistency of his story, its probability or improbability, and all other tests which do or do not convince, and, if the jury believed that his evidence was true, they should find for defendant, since it gave undue prominence to the engineer's testimony.

Same.—It was proper to refuse to instruct that the statutory provisions prescribing certain duties to be performed on perceiving an obstruction on the track, making the company liable for all damages resulting from a failure to comply therewith, and imposing on it the onus of proving compliance, only apply when there is an obstruction on the track against which the engine may strike, and it is or ought to be perceived by the engineer, the statutory duty and liability not arising when an animal suddenly springs on the track in such close proximity that human appliances cannot avoid a collision, since such instruction was misleading and improper under the evidence.

Appeal from circuit court, Jackson county; J. A. Bilbro, Judge.

Action by James A. Reaves against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This action was brought by the appellee, James A. Reaves, against the Southern Railway Company, to recover damages for the alleged negligent killing by a train run on the road of the defendant, of two mules, the property of the plaintiff. The facts of the case necessary to an understanding of the decision on the present appeal, are sufficiently stated in the opinion.

Upon the introduction of all the evidence, the defendant requested the court, among others, to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe the evidence they must find for the defendant." (2) "If the evidence satisfies the jury that the mules were grazing or standing in a ditch or depression 50 feet or more for the track when they were first discovered, then this was not such dangerous proximity to the track as required those in charge of the train to take any notice of them, they had a right to assume that they would not come upon the track. It was only when they made some move or start towards the track that any duty was required of him." (3) "The court charges the jury that the evidence in this case is without conflict that the mules were not in dangerous proximity to the track when they were discovered by the men in charge of the train." (4) "When an engineer sees cattle or stock by the side of the railroad, and not on the track, it is not incumbent on him, and he is not required to attempt to stop the train or frighten the animals away by blowing the whistle or ringing the bell, unless they are in dangerous proximity to the track, that is, unless they are so near to the track that they could get thereon ahead of the train, and unless they manifest an inclination to go toward the

track." (5) "The court charges the jury that the evidence in this case is without conflict, that the engineer and fireman were keeping a proper lookout at the place when the animals were found near the track on the occasion of the injury." (8) "Although you may believe from the evidence that the mules were killed by defendant's train, yet if you find from the evidence that at the time of the accident or injury the engineer was reasonably prudent in trying to avoid injuring the mules, you must find for the defendant." (9) "Although you may believe from the evidence that the mules were killed by defendant's train, yet if you find from the evidence that at the time of the accident or injury the engineer was reasonably prudent, you must find for the defendant." (10) "If you believe from the evidence that when the engineer first discovered the mules, they were not less than twenty-five feet from the track and were grazing or drinking and not coming toward the track, I charge you that they were not then in such dangerous proximity as to require the exercise by the engineer of any efforts to stop the train, or frighten the animals away." (11) "If the jury believe from the evidence that the mules came on defendant's track ahead of the train, and in such close proximity to the train that it was then impossible for the trainmen to stop the train in time to prevent injuring the mules, it was not incumbent on them to attempt to stop the train, and their failure to make such effort would not be negligence." (13) "The law does not require an engineer on perceiving an obstruction on the track to both blow the whistle and ring the bell. It is sufficient compliance with the law to either blow the whistle or ring the bell." (18) "The evidence of the engineer should be fairly and impartially weighed by the jury by his intelligence, his manner, the consistency of his story, its probability, or improbability, and all the other tests which do, or do not convince, and if the jury, after applying all these tests are convinced of the truth of his evidence, they have but one plain duty, and that is to render a verdict in favor of the defendant." (19) "The statutory provisions prescribing certain duties to be performed on perceiving an obstruction on the track of the road making the railroad company liable for all damages to persons, stock or other property resulting from a failure to comply with these requirements, and imposing on it in an action for damages, the onus of proving compliance only apply when there is an obstruction on the track, against which the engine or train running its proper course and direction may strike, and it is, or ought to be, perceived by the engineer. Nor does the statutory duty and liability arise when an animal suddenly springs on the track in such close proximity that human appliances cannot avoid a collision."

There were verdict and judgment for the plaintiff, assessing his damages at \$190.68. The defendant appeals, and assigns as error the refusal of the court to give the several charges requested by it.

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Humes, Sheffey &amp; Speake, for appellant.

John B. Tally, for appellee.

Haralson, J. The killing of the mules for which this suit was brought, occurred at or near Limrock, a regular station or stopping place on said railroad, and at or near a public road crossing on the line of said railroad. In such a case, the injury, ownership and value of the animals having been shown, a presumption of negligence arises, making a prima facie case of liability, and the burden of removing the presumption rests upon the defendant. *Railroad Co. v. Cochran*, 105 Ala. 354, 16 South. 797; *Railroad Co. v. Boyd* (Ala.) 27 South. 408; Code, §§ 3440, 3443.

It has also been repeatedly held by us, that "the running of a train under such conditions, or at such a rate of speed, as renders it impossible for the servants or agents having the management of it, to avoid injury to animals straying on the track, is negligence, rendering the company liable for the consequent injury." This principle is subject to the condition, that "if the engineer is competent, and keeps a proper lookout, and does not see and cannot see the approaching animal on or in dangerous proximity to the track, and it comes suddenly thereon,—so close to the train that the engineer cannot stop in time to prevent the accident, the company is not liable for the injury done to the animal." *Railroad Co. v. Brinkerhoff*, 119 Ala. 606, 24 South. 892; *Choate v. Railway Co.*, 119 Ala. 611, 24 South. 373; *Railway Co. v. Stark* (Ala.) 28 South. 411.

The court in this case charged the jury, presumably on all the law of the case, without objection on part of defendant. Thereupon the defendant requested 30 written charges, and the court gave 11 of them and refused 19.

The evidence of the engineer was in conflict with itself. He first testified: "When I first observed the mules, they were on the right side of the track feeding, about five feet from the track." Later he testified: "They were standing, the best of my judgment is, about fifty feet from the track, when I first saw them. They came out of the ditch, and ran directly towards the track. Both of them jumped right into the middle of the track, one following the other." Later, still, he testified: "My recollection is, that the mules threw up their heads, and made for the railroad, and forthwith jumped upon the track, and ran along in front of the engine, and down the middle of the track and not along its side." Other evidence tended to show, that the mules ran along the north side of the track some 250 or 300 yards before they attempted to cross, and were killed just as they jumped on the track. The evidence also tended to show that the track was straight and unobstructed at this point for a mile or more from where the animals were killed; that the accident occurred in the daytime, and the train was running from 40 to 60 miles an

hour, according to the various estimates of the witnesses, and the mules might have been seen for a half mile.

Refused charges 2 and 10, if not faulty for other reasons, were properly refused because they hypothesized facts not shown in evidence.

The third and fifth, were properly refused. The third ignores the keeping of a proper lookout by the engineer; and the fifth assumes, and requested the court to charge as a matter of law, that he was keeping such a lookout, whereas the plaintiff's evidence tends to show he was not.

When an animal is perceived near to the track of a railroad, the diligence required of an engineer of a moving train is not the same as if it were on the track, and he is not required to stop or check the train, unless the circumstances indicate that the animal is likely to move on the track, or will probably be injured if it remains stationary. *Railway Co. v. Lazarus*, 88 Ala. 453, 6 South. 877. The likelihood of its moving on the track would depend, of course, upon the circumstances,—its proximity or remoteness from the track, what it is doing, and the disposition it manifests at the time,—and this likelihood, dependent on circumstances, is for the jury to determine. It is only when the engineer, who is competent and vigilant by keeping a steady lookout to discover stock, does not and cannot see the approach of an animal in dangerous proximity to the track,—that is, so close to the train that the engineer cannot stop in time to prevent injuring or killing it, when it comes suddenly on the track,—that the company is not liable for injuring it. Without this, as has been repeatedly held, if the train is run under such conditions, or at such a rate of speed, as renders it impossible for those in charge to avoid injuring an animal coming suddenly on the track, it is negligence rendering the company liable for the consequent injury. Authorities *supra*. Charge 4 is not in consonance with these principles.

The eighth and ninth charges are faulty. They ignore a steady lookout by the engineer to discover the animals, and it is not sufficient that he should have been reasonably prudent to avoid injuring them at the time they were injured. He may, notwithstanding, have been careless before that time in not discovering them sooner, and in running his train at such a rate of speed as not to be able to avoid injuring them, after he did discover them.

The thirteenth was properly refused. The defendant, under the evidence, may have been liable for injuring the animals, even if the engineer did blow the whistle and ring the bell of the engine; and besides, as for what that fact was worth, the court had just charged the jury, at the instance of defendant, that if they believed the evidence, they "must find that the servants in charge of the engine blew the whistle and rang the bell, as the law required."

The eighteenth gives undue prominence to the evidence of the engineer.

## McGill v. Minneapolis &amp; St. L. R. Co

The nineteenth was misleading and improper to be given, under the evidence in the cause. Independent of the statutory provisions as to the burden of proof being on the defendant, as to the ringing of the bell and blowing the whistle, the other evidence fully justified the finding of defendant's liability for the injury done the animals.

The other charges were, under the evidence, so manifestly properly refused, as to require no particular comment.

Affirmed.

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McGILL *et al.*

*v.*

MINNEAPOLIS & ST. L. R. CO.

(*Supreme Court of Iowa, April 10, 1901.*)

[85 N. W. 620.]

**Injury to Stock at Crossing—Failure to Provide Cattle Guards—Notice to Company.**—The question of the negligence resulting from the failure of a railroad company to construct cattle guards at a private crossing, after request made to an officer whose duty includes the control of such cattle guards, as required by Code, § 2022, should not be submitted to the jury in an action for cattle killed at such a crossing, where the request for the construction of such guards is shown to have been made to officials having no control thereover.

**Same—Same—Not Actionable Negligence, unless Cause of Injury.**—Where the failure to maintain such cattle guards is not shown to have contributed to the injury, it is error to submit such issue.

**Same—Failure to Give Signals—Cause of Injury—Questions for Jury.**—The question whether the statutory signals were given by a locomotive approaching a crossing at which cattle were killed, and whether the failure to give such signals was the cause of the death of the cattle, is for the jury, though the person driving the cattle knew of the approach of the train before the time when the signals should have been given, since the duty of giving such signals is for the protection of the animals.

**Same—Contributory Negligence of Boy Driver—Instructions.**—Where an action is brought against a railroad company for cattle killed while being driven across the track by plaintiff's minor son, it is error to instruct that the age of the boy may be considered in determining whether he exercised reasonable care, since the plaintiff is chargeable with the negligence of the boy, without regard to his years.

**Same—Failure of Driver to Look and Listen.\*—Driving cattle over a railroad track without looking and listening for a train is negligence which will preclude a recovery for animals killed by a train.**

**Same—Same—Extra Trains.**—The fact that the regular trains of a railroad have passed does not excuse a person crossing the track with cattle from the duty of looking and listening before driving the cattle on the track.

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\*See notes at end of case.

Appeal from district court, Webster county; J. R. Whitaker, Judge.

Action in two counts, the first to recover \$40 for a cow killed at a private road crossing on plaintiffs' farm by one of the defendant's trains, on the 26th day of October, 1898. The second count is to recover a balance of \$28 on account of the killing of a steer. The contentions on this appeal relate entirely to the first count and therefore the second will not be further noticed. The defendant answered the first count, admitting its corporate capacity and the killing of the cow claimed by the plaintiffs to be theirs, and denying every other allegation of said count. Verdict and judgment were rendered in favor of the plaintiffs for \$40. The amount in controversy not exceeding \$100, this appeal is taken by the defendant on the certificate of the trial judge, under section 4110 of the Code, that it is a case in which an appeal should be allowed. Reversed.

R. M. Wright, for appellant.

M. J. Mitchell, for appellees.

Given, C. J. 1. The general direction of the defendant's road is north and south. It runs through plaintiffs' farm on a continuous curve, entering it from the northwest across the the west line of the farm, and leaving it a short distance north of the south line; thus leaving a small part of the farm west of the track, which plaintiffs used as a pasture. The dwelling house and stock yards are east of the track. There was a private crossing, with gates, in the right of way fence, but no cattle guards, by which the plaintiffs had access to said pasture, and to the public highway along the west side of their farm. On the evening of October 26, 1898, the plaintiffs sent Charles McGill, a lad aged 15, on horseback, to drive 25 or 30 head of cattle from the pasture over said private crossing to the stock yard. Two regular trains due to go south between 5 and 6 o'clock p. m. having passed, the boy went to drive up the cattle, leaving the crossing gates open as he went, and he at once proceeded to drive the cattle over the crossing. An extra freight train, going south, came along when the cattle were on the private crossing, and struck and killed the cow for which compensation is sought. There are two highway crossings northwest of said private crossing, the first being 405 feet distant therefrom, and the other 1,848 feet beyond that, making the distance to the furthest crossing 2,253 feet. Plaintiffs charged, as the negligence causing the killing of their cow, as follows: That defendant failed to put in cattle guards at said private crossing within a reasonable time after being requested so to do; that defendant's enginemen on said train failed to ring the bell or sound the whistle at either of said crossings.

2. We think the charge of negligence in not putting in cattle

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guards should not have been submitted to the jury, for two reasons: The court properly stated the law to be that the defendant was required to build and maintain cattle guards within a reasonable time after having been properly requested (Code, § 2022); also that the request must be of some officer or agent of the company acting within the scope of his duties, such duties including the management or control of the putting in of cattle guards or of ordering them to be put in. The evidence not only fails to show that any of the three persons of whom it is alleged the request was made had such authority, but it appears without contradiction that none of them was charged with such duty at that place. It was not until the request was made that plaintiffs had a right to complain of the failure to put in cattle guards, and, as no request was shown to have been made of any person authorized to act in the matter, the absence of cattle guards furnishes no ground of complaint. The evidence fails to show that the absence of cattle guards caused or contributed to the killing of the cow.

3. The charge of negligence in failing to ring the bell or sound the whistle, so far as the conduct of the boy is concerned, seems to have been entirely immaterial. He testifies: "I first saw the train up there from Westley's crossing." That, as we have seen, was 2,253 feet from the private crossing, and at the furthest crossing, where it is claimed the engineman failed to give the required signals. As the boy knew of the approach of the train by seeing it about as soon as he would have known it from the signals, it is immaterial, so far as his conduct is concerned, whether or not the signals were given. In *Graybill v. Railway Co.* (decided at Jan. Term, 1901) 84 N. W. 946, we held that such signals are required, not only for the purpose of warning human beings, but for the protection of animals as well. In view of this construction of the statute, it was for the jury to determine whether the signals were given as required, and, if not, whether the failure to give them was the cause of the killing of the cow.

4. One ground of defendant's motion for a new trial was that the plaintiffs were guilty of contributory negligence; also that the court erred in giving the tenth instruction. The court instructed to the effect that the plaintiffs were required to exercise reasonable care,—that is, the care that an ordinarily prudent man would exercise under the circumstances,—and that a failure to exercise such care would be negligence. The jury was instructed that in considering this question of care it should consider the age of the boy. This, we think, was error. The plaintiffs are held to the exercise of reasonable care in driving, or causing their cattle to be driven, upon the crossing. They are chargeable with the conduct of the boy in driving the cattle, and, if he failed to exercise reasonable care, the failure is theirs, the same as if they had



## Notes

driven the cattle themselves. If this was an action by the boy, the rule of the instruction might apply, but, as between these parties, the plaintiffs are chargeable with the negligence of the boy, regardless of whether it might be excusable as to him because of his tender years. *Fitch v. Railroad Co.*, 13 Hun, 668. That the boy was negligent can hardly be questioned. It is in evidence that, knowing that the regular trains had passed as usual, he assumed, as he had no right to do, that no other trains would be passing at that time, and thus assuming, without stopping to look or listen for a train, he proceeded to drive the cattle over the crossing. That he had no right to assume that a train might not pass at any time, and that it was his duty to look and listen for trains before driving the cattle onto the crossing, have been held many times by this court. See *Wooster v. Railway Co.*, 74 Iowa, 593, 38 N. W. 425. There is nothing in the facts of this case to support the theory that defendant became liable for negligence after knowing of the peril of the cattle. We think the motion for a new trial should have been sustained upon the grounds just considered. As, for the reasons already stated, the judgment must be reversed, it is unnecessary that we consider other errors assigned and discussed, as they are not such as are likely to arise upon a retrial. Reversed.

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NOTES.

**Crossings—Failure to Stop, Look, and Listen as Contributory Negligence.**—See generally, *Smith v. Boston & M. R. R.* (N. H.), 19 Am. & Eng. R. Cas., N. S., 320, and *foot-note*, 321.

**Same—Same—Injuries to Cattle.**—A person who drives his cattle over a railroad crossing without looking or listening is guilty of negligence; but where the cattle are killed by a train, and it is shown that the company's employees, by the use of ordinary care and diligence, could have avoided the injury after discovering the danger, a recovery cannot be defeated on account of the owner's contributory negligence. *Wooster v. Chicago, M. & St. P. R. Co.*, 35 Am. & Eng. R. Cas. 152, 74 Iowa 593, 38 N. W. Rep. 425; *Morris v. Chicago, B. & Q. R. Co.*, 45 Iowa 29.

In actions based on negligence there can be no recovery where the plaintiff and defendant stand *in pari delicto*. So held, in an action where it appeared that plaintiff, who was driving cattle, was told by a companion that he believed a train was approaching, and replied that he thought not, and that they would "rush" the cattle over the track anyway, and where some of them were killed by a train running without the required signals. *Ohio & M. R. Co. v. Eaves*, 42 Ill. 288.

## Central of Georgia Ry. Co. v. Tribble

## CENTRAL OF GEORGIA RY. CO.

v.

## TRIBBLE.

*(Supreme Court of Georgia, Feb. 28, 1901.)*

[38 S. E. 356.]

**Accident at Crossing—Speed in Violation of Ordinance—Contributory Negligence.\***—When, in an action to recover damages from a railroad company for injuries to person and property occasioned by the running and operation of a train of cars over a street crossing in a city, it was conclusively shown that the speed at which the train was being run was higher than that prescribed by a valid municipal ordinance, and that no effort was made to so check the speed in passing over the crossing as to be able to stop if necessary to prevent injury to one attempting to cross, the company was, relatively to such person, negligent, as a matter of law; and in order to prevent a recovery it must have been shown that the injury was done with the consent of the injured person, or that he could, by the exercise of ordinary care, have avoided the consequences of the negligence of the company. In such a case proof that the injured person contributed to the injury may be shown in mitigation of damages or to defeat a recovery, if such contribution itself amounted to a want of ordinary care under the existing circumstances.

**Case at Bar.**—In the present case there was a sufficiency of evidence to support the verdict for the plaintiff, and no error of law sufficient to set it aside was committed.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by W. A. Tribble against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hall & Wimberly and R. C. Jordan, for plaintiff in error.

Gurney & Hall, for defendant in error.

Little, J. Tribble brought an action against the railway company to recover damages for killing his horse and injuring himself at a street crossing in the city of Macon. It appears from the evidence that the plaintiff and two others were in a buggy drawn by the horse of the plaintiff, which the latter was driving on Poplar street. On account of the situation of certain houses in close proximity to the railroad tracks where they intersected the street, neither the engineer nor fireman on the locomotive could observe the

\*As to whether it is negligence *per se* to run a train at a rate of speed prohibited by ordinance, see *Jackson v. Kansas City, etc., R. Co. (Mo.)*, 19 Am. & Eng. R. Cas., N. S., 99, and *note*, 119.

## Central of Georgia Ry. Co. v. Tribble

approach of a person intending to cross the tracks until the locomotive was upon or very near the crossing. For the same reason, one intending to cross could not observe the approach of the locomotive until within a short distance of the tracks. The injury was occasioned by reason of the fact that the horse which plaintiff was driving came in contact with the tender of the locomotive on the crossing. The horse was killed, and there was evidence that plaintiff was hurt. It was claimed by plaintiff that he exercised all proper and reasonable care and diligence in the driving and management of the horse and in approaching the crossing; that the approach of the locomotive to the crossing was not signaled by the ringing of the bell, nor in any other manner; that the speed of the train over the crossing was from 18 to 20 miles an hour; that the engineer did not check and keep checking the speed of his train until it came to the crossing; that as soon as he discovered its approach, and when he was very near it, he endeavored to stop his horse, which was a gentle one and ordinarily under easy control; that he was unable to do so, and his horse became unmanageable and struck the tender as the train was crossing; that all this happened without any fault or negligence on his part; and that it was due alone to the negligence of defendant company. An ordinance of the city of Macon made it unlawful for any engineer of any railroad company to run an engine or train through that part of the city at a greater rate of speed than 5 miles an hour. The defendant contended, and introduced evidence to show, that the bell on the locomotive was being rung as the train approached the crossing; that the engineer blew the crossing signal at the properly designated point; that the speed of the train was only from 10 to 12 miles an hour; that plaintiff was improperly and negligently driving down Poplar street, and recklessly ran his horse against the train as it was crossing; that the injury was occasioned by the negligence of the plaintiff, who could have avoided it by the exercise of ordinary care. The evidence as to the care and diligence both of the plaintiff and defendant was conflicting. Much of it supported the contentions made by each. The jury returned a verdict in favor of the plaintiff for the value of the animal, and for the injuries which the plaintiff sustained, in the amounts claimed. The defendant moved for a new trial, which being overruled, it excepted.

The damages which were shown in this case occurred by reason of the operation of a locomotive and cars which were being run by defendant company. The Civil Code (section 2321) declares that the company shall be liable in such cases unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in this and all other like cases being against the company. Not only has this presumption not

Accident at  
Crossing—Speed  
in Violation of  
Ordinance—Con-  
tributory  
Negligence.

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Union Pacific track at this point is 99 feet. This incoming passenger train neither blew the whistle at the whistling post nor rang the bell at the crossing. It was behind time, and running at about its usual schedule rate,—50 miles an hour. When the freight had cleared the crossing these parties started to drive across, and the time between which the freight had cleared this crossing and the arrival of the passenger, according to the evidence, could not have exceeded two minutes, and may not have exceeded one. When the plaintiff in error had introduced her evidence and rested, the defendant in error filed a demurrer thereto, which the court sustained, and a judgment was rendered against the plaintiff in error for costs. She brings the case to this court, alleging error.

Allen & Allen, for plaintiff in error.

A. L. Williams, N. H. Loomis, and R. W. Blair, for defendant in error.

Greene, J. (after stating the facts). It is not contended by counsel that plaintiff in error is entitled to recover in this action unless her conduct in going upon the railroad crossing without looking for an approaching train can in some way be excused; but they forcibly insist that she is excusable, in that the railroad company, by its agents, negligently and wrongfully misled and put her off her guard, and but for such negligence and wrongful acts she would not have gone upon the track, and it is claimed that, she being a young woman of 17 years, she should not be held to that strict accountability of one of maturer years. It is further contended that, even if Bowhay was guilty of contributory negligence, such negligence is not imputable to her. Elliott on Railroads (section 1171) states the principle involved in this first proposition as follows: "Where the employees of a railroad company by negligence or wrongful acts mislead a traveler and put him off his guard, the company may be liable, although the traveler may have done that which but for the wrongful or negligent acts of the company must have been considered negligence on his part. The negligence of the company will not, however, excuse the traveler for a failure to himself exercise ordinary care." It is but ordinary care for one who is attempting to cross a railroad track to look to see if a train is approaching, and no negligence on the part of defendant in error would excuse the plaintiff in error from exercising such care. One attempting to cross a railroad track has no right to omit to use his senses of sight and hearing, and rely entirely upon some rules or supposed rules of the company. The rules put in operation from time to time by a railroad company regulating the speed of its trains, the distance each shall run, or the time or distance such trains shall remain apart, are mere conveniences to better enable such company to systematically carry on its business, and are not intended to be a warning

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or notice to the public that trains will not be run except on schedule time. In *Railway Co. v. Jones*, 76 Ill. 311, 315, in speaking of irregular trains, the court uses this language: "There is nothing which can relieve a person from the duty of exercising due care and caution at a railroad crossing. It is not always the case that trains are on time, as is well known; hence the pressing necessity of using vigilance, care, and caution at all times." In *Wilds v. Railroad Co.*, 29 N. Y. 325, it was remarked by Denio, J., that "no one can be secure against being met by an engine, except by ascertaining by his own senses that no train is approaching in either direction within a distance which will endanger his safety." In *Wilcox v. Railroad Co.*, 39 N. Y. 358, 362, the court, in quoting this language, said: "There is much force in this suggestion; and it would, in my opinion, furnish a very imperfect and unsafe protection to a traveler to rely merely upon his knowledge of the time table, or upon the fact that an unusual train had passed in an opposite direction, and therefore none other could be excepted. The reason urged, I think, furnishes no sufficient excuse for the neglect of the deceased to use his faculties, and for neglecting to exercise a proper degree of vigilance and care." "Swiftly moving and irregular trains are to be expected at crossings, and it is the duty of persons about to go over them to look and listen for such trains, as well as for those upon time or which move slowly." *Judson v. Railway Co.*, 63 Minn. 248, 65 N. W. 447. A traveler should always approach a railway crossing under apprehension that a train is liable to come at once, and, while he may presume that those in charge will obey the law by giving the signals, the law will nevertheless require that he obey the instincts of self-preservation, and not thrust himself into a situation which, notwithstanding the failure of the company, he might have avoided by the careful use of his senses. "So that it seems that though a person or traveler may know the usual time of the running of different trains, from the fact that they may know that a train has passed, and that another train will not be along for some time, according to their information or the time table, it does not relieve him of the duty of observing care and prudence or of using his faculties when he approaches and attempts to cross a railroad track. \* \* \* He who fails to exercise this precaution when there are no circumstances to disturb his judgment or impede his action at the time is not using ordinary care." *Durbin v. Railroad Co. (Or.)* 11 Am. St. Rep. 778, 17 Pac. 5. "The fact that the train is behind time and is running faster than usual at the crossing does not excuse one from exercising the care and caution required of him when the train is running at its usual rate." *Railway Co. v. Howard*, 124 Ind. 280, 24 N. E. 892, 8 L. R. A. 593. We have held that it is negligence per se for a railroad company to run its train over a crossing without sounding a whistle, but we have also held

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that this does not excuse one attempting to cross a track from listening and looking for approaching trains.

It is also contended that the plaintiff in error is excusable for not exercising ordinary care because of the fact that this train was running 50 miles per hour,—an unusually high rate of speed at this particular crossing. The only evidence on this point is the testimony of George W. Veal, Jr., who says he was on the train; that it was running on its schedule time—about 50 miles an hour—when it passed this crossing. This road is considerably traveled, but no persons were there on this particular evening besides plaintiff in error and Mr. Bowhay. Another contention of plaintiff in error on this point is that her attention was attracted to the outgoing freight which has just passed the crossing over which she wished to pass. We think in this there can be found no excuse whatever. This train threatened no danger. It had passed the crossing over which she desired to go, and was rapidly receding from sight. We think it must be true that an object which attracts the attention of one attempting to cross a railroad, which will excuse him from looking and listening for an approaching train, must be one that necessarily distracts his attention. It must be one that at least indicates danger or some risk. It must be an object or a condition that has a tendency to perplex or confuse him at a time when it is demanded of him that he exercise judgment and act promptly. Certainly the departure of the freight train, attended with no unusual circumstances, was not sufficient to excuse one from exercising ordinary care when attempting to cross a railroad track on a highway. The plaintiff in error knew that she was approaching a railroad crossing. She was compelled to stop for a passing freight. She made this stop 150 or 200 feet from the crossing. This was a still evening, no wind blowing, and nothing to prevent her having heard the approaching train except the noise of the departing freight. When within 50 feet of the crossing she could have seen this train 1,300 feet away. From that time she neither looked nor listened.

It is contended by plaintiff in error that, if Bowhay was guilty of contributory negligence in driving upon the track without looking or listening for approaching trains, such negligence is not imputable to the plaintiff in error. We think the want of care which resulted in injury to the plaintiff in error is chargeable to her. They were both engaged in a common purpose,—mutual pleasure. Her opportunity and ability to see and appreciate the danger was equal to his. She was in no way relying upon him. It is true, he furnished the vehicle and did the driving but she seems to have acted independently of him. When they started from the point where they had stopped for the freight, she saw the track, knew they intended to cross it, appreciated the danger, and did not advise or suggest that they be more cautious, but did look for an approaching train, and was in fact the first to see it. The case of Reading

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TP. v. Telfer, 57 Kan. 798, 48 Pac. 134, relied upon by counsel for plaintiff in error, is easily distinguishable. In that case there was no charge made that Mrs. Telfer was guilty of contributory negligence. The only question was whether or not the contributory negligence of the husband was imputable to her. In this case the direct charge is made that plaintiff in error was herself guilty of contributory negligence. In *Donnelly v. Railroad Co.*, 109 N. Y. 16, 22, 15 N. E. 733, the court, in speaking of the negligence of one who is riding with and accompanying the driver, said: "We think the plaintiff was chargeable with the neglect of his comrade. He was conscious of the danger, and apparently made no objection or effort to avoid it. He was engaged in a common employment with Mr. McNally. He had full control of his own actions, and, though on the safe track, did not object when, after telling McNally to turn out, they turned upon the dangerous track." In *Brickell v. Railroad Co.*, 120 N. Y. 290, 293, 24 N. E. 449, the court said: "It is no less the duty of the passenger, where he has had the opportunity to do so, than of the driver, to learn of danger, and avoid it if practicable." We think the demurrer to the evidence was properly sustained, and the judgment of the court below will be affirmed. All the justices concurring.

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BECKER

v.

## LOUISVILLE &amp; N. R. Co.

*(Court of Appeals of Kentucky, April 12, 1901.)*

[61 S. E. 997.]

**Contributory Negligence—Boy Incurring Danger to Rescue Girl.\*—**Plaintiff, a boy 12 or 14 years of age, was not guilty of contributory negligence in remaining on a railroad bridge, after he saw a train approaching, for the purpose of rescuing one of his companions, a girl about the same age, who had fallen between the ties.

**Duty to Trespasser on Railroad Bridge.†—**If the engineer saw plaintiff in time to have so slackened the speed of the train as to enable plaintiff to reach the end of the bridge in safety, he was guilty of negligence in failing to do so, though plaintiff was only a trespasser; there being no other means of escape for plaintiff.

**Same—Negligence and Contributory Negligence—Direction of Verdict.—**As the engineer, if he was on the lookout must have seen plaintiff and his companions in time to so slacken the speed of the train as to

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\*See notes at end of case.†See generally, *Southern Ry. Co. v. Bush* (Ala.), 19 Am. & Eng. R Cas., N. S., 46, and *foot-note*.

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enable plaintiff to escape, and is not to be presumed that he would have gone upon the bridge without looking to see whether it could be crossed in safety to the crew, the question as to whether the engineer did see the children in time to slacken the speed of the train so as to save plaintiff was for the jury, especially as some one was seen to look out of the cab of the engine towards the bridge as the train approached.

Appeal from circuit court, Lincoln county.

"To be officially reported."

Action by Claude W. Becker, by next friend, against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for defendant, and plaintiff appeals. Reversed.

Robert Harding, John W. Rawlings, and Emmet V. Puryear, for appellant.

Chas. R. McDowell and J. W. Alcorn, for appellee.

Guffy, J. It is substantially alleged in the petition that one Mary Vanarsdale, an infant between 12 and 14 years of age, was upon the railroad bridge of the defendant at said time and place, and in front of said approaching train, and in great danger and peril of being run over by said train, and was placed in said danger and peril aforesaid by the gross negligence of defendant in failing to slacken said speed of said train after it became aware of her presence on said track and bridge, and by the gross negligence of the defendant in failing to stop said train after it became aware of her presence on said track and bridge, and by the gross negligence of the defendant in the operation of said train after it became aware of her presence thereon, and that defendant became aware of her presence on said bridge in ample time to slacken the speed of said train to avoid running over and upon her and relieve her of said danger and peril. It is further alleged that plaintiff, Becker, undertook to rescue the said Vanarsdale from her peril and danger, and to enable her to escape from being killed by said train by the gross negligence of defendant, and in his efforts to rescue said Vanarsdale, and while he was endeavoring to do so, the train ran over him, knocking him from said bridge, and permanently injuring him, to the damage of \$5,000, for which he prayed judgment. The answer denies that on the occasion mentioned it could have slackened the speed of its train any more than it did after it became aware of the presence of said Vanarsdale and plaintiff, or that after it became aware of their presence on the bridge it could have avoided running over them. Denies any negligence at all. The answer may also be treated as pleading contributory negligence upon the part of the plaintiff. It is also pleaded that neither plaintiff nor Vanarsdale had any right to be upon the bridge in question. The affirmative averments of the answer were prop-



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erly denied by reply. After the pleadings were made up, and various motions disposed of, which we deem it unnecessary to notice, the trial was entered into; and at the conclusion of plaintiff's testimony the court, upon motion of defendant, instructed the jury peremptorily to find for the defendant, which was accordingly done. And, plaintiff's motion for a new trial having been overruled, he prosecutes this appeal.

The sole question presented for decision is whether the plaintiff was entitled to have the case submitted to the jury, or, in other words, was there sufficient evidence from which the jury might find a verdict for the plaintiff? It appears from the evidence in this case that five children, to wit, Ed Hunn, Katie Hood, Lillie Owens, Mary Vanarsdale, and plaintiff, the ages of whom are about as follows: Lillie Owens, between 8 and 9; Ed Hunn, in his fourteenth year; Katie Hood, about 15; Mary Vanarsdale, between 12 and 13; and the plaintiff, in his fourteenth year, —had gone to the creek for the purpose of fishing, and, not being satisfied with the first point they reached, decided to go to another place, and, to reach it, decided to cross the creek on the railroad bridge, and while crossing it they heard or by some means became aware of the approaching freight train, and at once made an effort to get out of the way of the train, by continuing to cross the bridge to the other side of the creek. Three of the party escaped, but Miss Vanarsdale, it seems, fell through between the ties or bars of the bridge; and the plaintiff, who seems to have been her escort, sought to rescue her, and perhaps pulled her up once out of the opening in which she had fallen, but she again fell into another, and as the result of this delay she was killed, and the plaintiff suffered the injuries sued for in this action.

It is the contention of appellee that plaintiff had no right to be on the bridge, and that it owed him no duty until after it discovered his peril, which it claims it did not do in time to avoid the injury; also that he was guilty of such contributory negligence as to bar his right to recover. It is evident that it was the legal right as well as the moral duty of the plaintiff to remain with and seek to rescue his companion, and, so far as that question is concerned, the law seems to be well settled that he was not guilty of any contributory negligence for remaining on the said bridge for the purpose of saving the life of his companion.

It is the contention of appellant that the defendant or its agents discovered those parties upon the bridge in ample time to have slackened the speed of the train so as to enable the plaintiff to have avoided the danger.

The evidence conduces to show that the engineer could see the whole bridge from a distance of 960 feet, and one standing on the track at the bluff can see the whole length of the bridge for 320 yards; that a man in the cab could see the train 120 feet further back. The proof also conduces to show

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road Bridge.

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that a man in the cab could see the bridge 120 feet further back than if on the ground. It is also evident from the proof that for a considerable distance from the bridge it is up grade in reaching the bridge in question. There is also some proof tending to show that some one on the engine was seen to put his head out, as if looking towards the bridge, at some distance from it. It seems to us, from the evidence, that the jury were authorized to believe and to have found that the defendant's agents and servants saw those children upon the bridge in ample time to have so slackened the speed of the train as to enable them to have escaped the danger. There is hardly room to doubt this, from the map and evidence filed in this action. It is not at all reasonable to suppose that the defendant, if it had a right to do so, was indifferent as to the condition of the bridge it had to cross. It can hardly be presumed that the defendant would not feel enough of interest in its own train and those aboard to risk running on the bridge without looking to see whether the bridge was in a condition to be crossed in safety to the crew, and if the defendant was on the lookout it must have seen those children in time to have slackened the speed of the train and thus have prevented the injury. The reasonable conclusion is that the children were seen, but the defendant supposed that they had ample time to complete the crossing of the bridge and thus escape injury, which the proof evidently shows they would have done but for the misfortune of Miss Vanarsdale in falling between the ties or bars of the bridge. If it be conceded that the plaintiff was a trespasser, and that defendant owed him no duty except to protect him after discovering his peril, it is clear that when discovered upon the bridge the defendant should have given him ample time to have escaped. If he had simply been on the railroad track in the open country, it might be said that defendant had a right to presume that he would step off the track and get out of the way of the train; but if a party, having started to cross a bridge of as much length as the one under consideration, had no means of escape except to reach the termination of the bridge, common humanity demands that, even if a trespasser, he should not be wantonly run over, but should have a reasonable chance to cross the bridge in safety. A few minutes' delay of the train would have saved plaintiff the great personal injury which he suffered in the vain attempt to save the life of the little girl with him. It is said in section 483, 2 Shear. & R. Neg.: "The rule stated in section 99, that the plaintiff may recover, notwithstanding his contributory negligence, if the defendant, after becoming chargeable with notice of the plaintiff's danger, failed to use ordinary care to avoid injuring him, has been enforced in many railroad cases. \* \* \*

Thus, a locomotive engineer or motorman, after becoming aware of the presence of any person on or dangerously near the track, however imprudently or wrongfully, is bound to use as much care to avoid injury to him as he ought to use in

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favor of one lawfully and properly upon the track; that is to say, ordinary care with respect to anticipating injury before it becomes imminent, and the utmost care and diligence of which he is personally capable after he knows that it is imminent. He must promptly use all the usual signals to warn the trespasser of danger, and he must also check the speed of his train, and even bring it to a full stop, if necessary, unless the circumstances are such as to justify him, acting prudently, in believing that the traveler sees or hears the train, and will step off the track in ample time to avoid all danger without any diminution of the speed of the train. These rules apply to all cases, even of the most outrageous negligence on the part of a person on the track,—as, for example, where a person attempts to cross in the very front of a train, or where children or drunkards have actually fallen asleep, lying across the rails. If the engineer becomes aware of anything lying upon or dangerously near the track, which may possibly be a human being or a valuable animal, he is bound to check the speed of his train so as to enable him to stop in time to avoid injury; and, if injury ensues from his neglect to do this, his sincere belief that the object was worthless is of no defense. In general, an engineer has the right to assume that a person walking upon the track is free to act, and is in possession of all ordinary faculties, and will therefore act with ordinary prudence; but, when the conduct of the traveler is such as to excite a doubt of this, the engineer is bound to use greater caution, and to check or even stop the train, as may be necessary. So, where he sees a little child upon the track, he has no right to assume that the child will use the same discretion for its own protection as an older person would; and he must bring the speed of the train under control as quickly as possible, so as to be able to stop it altogether if the child does not appreciate its danger." In section 484, Id., it is said: "The rule stated in the last section, however, does not cover the whole ground. The defendant is responsible not only for what he actually knows, but for that which he is bound to know. It is clear that the frequent statements that contributory negligence is an absolute bar to recovery, except where the defendant's conduct has been 'reckless,' 'willful,' or 'wanton,' or even grossly negligent, are not sound. No courts have in actual practice adhered to this imaginary rule. It has been explicitly overruled, and, indeed, it has been explained away or disavowed by courts which had previously stated it."

After a careful consideration of the evidence in this case, as well as the law applicable thereto, we are clearly of the opinion that the court erred in giving the peremptory instruction. The evidence made a *prima facie* case which would entitle plaintiff to recover. The judgment appealed from is therefore reversed, and the cause remanded, with directions to award plaintiff a new trial, and for proceedings consistent herewith.

Same—Negli-  
gence and  
Contributory  
Negligence—  
Direction of  
Verdict.

## Notes

**WHETHER CONTRIBUTORY NEGLIGENCE TO INCUR DANGER TO SAVE HUMAN LIFE.**

**Not Per Se.**—A person is not necessarily guilty of contributory negligence in voluntarily exposing himself to bodily peril in order to rescue another from impending danger. *Condiff v. Kansas City, etc., R. Co.*, 45 Kan. 256, 48 Am. & Eng. R. Cas. 417, 25 Pac. Rep. 562; *Maryland Steel Co. v. Marney (Md.)*, 42 L. R. A. 842; *Mayo v. Boston & M. R. Co.*, 104 Mass. 137; *Linneham v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Lane v. Atlantic Works*, 107 Mass. 104; *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208; *Donahoe v. Wabash, St. L. & P. R. Co.*, 83 Mo. 560, 53 Am. Rep. 594.

It is not contributory negligence as matter of law to incur danger in attempting to rescue another from impending danger. The question whether one so acting should be charged with contributory negligence in an action brought by him to recover damages for injuries received in attempting the rescue, is one of mixed law and fact, and should be submitted to the jury upon the evidence, with proper instructions from the court. *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 13 L. R. A. 190, 29 Am. Rep. 553.

In *Eckert v. Long Island R. Co.*, 43 N. Y. 502, 3 Am. Rep. 721, it was held that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons." In that case the rescuer lost his life in throwing a small child from the track of an approaching train, and a judgment in favor of his administrator for damages resulting from his death was affirmed by the court of appeals. See also, *Gibney v. State*, 137 N. Y. 1, 33 Am. St. Rep. 690, 19 L. R. A. 365; *Maryland Steel Co. v. Marney (Md.)*, 42 L. R. A. 842; *Linneham v. Sampson*, 126 Mass. 506, 130 Am. Rep. 692; *Lane v. Atlantic Works*, 107 Mass. 104; *Mayo v. Boston & M. R. Co.*, 104 Mass. 137; *Donahoe v. Wabash, St. L. & P. R. Co.*, 83 Mo. 560, 53 Am. Rep. 594; *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 29 Am. St. Rep. 553.

**Proximate Cause.**—Where a person is injured while attempting to save the life of a person endangered by the negligence of another, such negligence is the proximate cause of his injury. *Maryland Steel Co. v. Marney (Md.)*, 42 L. R. A. 842.

If one in attempting to save human life does not rashly and unnecessarily expose himself to danger, and is injured, the injury should be attributed to the party that negligently or wrongfully exposed to danger the person who required assistance. *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 13 L. R. A. 190.

In *Gibney v. State*, 137 N. Y. 1, 33 Am. St. Rep. 690, 19 L. R. A. 365, where it appeared that a father was drowned in attempting to rescue his child who, owing to a defect in a bridge, had fallen into the water, it was held that such defect was the cause of the death of both.

**Effect of Rescuer's Prior Negligence.**—A mother is not guilty of contributory negligence in attempting to rescue her infant child from a railroad train that will prevent her from recovering for injuries inflicted upon her by the train while making such attempt, even though she had negligently allowed the child to be upon the track. *Donahoe v. Wabash, St. Louis & Pacific Ry. Co.*, 83 Mo. 560, 53 Am. Rep. 594.

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**Absence of Negligence.**—In *Donahoe v. Wabash, St. Louis & Pacific Railway Co.*, 83 Mo. 560, 53 Am. Rep. 594, the court, in accordance with its holding, said: "The seventh [instruction] for plaintiff is still more objectionable. It asserts that Mary Donahoe had a right to make every effort to rescue her child and was not to be charged with contributory negligence in the attempt, in the manner made, unless she made such efforts under the circumstances as would constitute rashness in the judgment of prudent persons. This entitled plaintiff to a recovery, whether defendant was guilty of any negligence or not, provided she was not guilty of rashness in the attempt to save the child. This as we have seen is not the law. The defendant is not chargeable with her injury, unless it was guilty of negligence with respect to the child before the mother attempted its rescue, or with respect to the mother or the child after her efforts to save the child commenced."

**Degree of Danger That May Be Properly Incurred.**—Where another is in great and imminent danger, one who attempts a rescue may be warranted by surrounding circumstances in exposing his limbs or life to a very high degree of danger; and in such cases he should not be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment. *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 29 Am. St. Rep. 553, 13 L. R. A. 190.

**Not a Trespasser.**—A person while upon a railroad track to save another from danger is not a trespasser. *Spooner v. Delaware, L. & W. R. Co.*, 115 N. Y. 22, 39 Am. & Eng. R. Cas. 599, 21 N. E. Rep. 696, 23 N. Y. S. R. 554.

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TANNER

v.

MISSOURI PAC. RY. CO.

(*Supreme Court of Missouri, Division No. 1, March 12, 1901.*)

[61 S. W. 826.]

**Injury to Person near Track—Failure to Look or Listen.\***—Plaintiff was struck by defendant's train between 1 and 2 o'clock in the morning, while standing in a space seven or eight feet wide between the tracks, at a depot platform. The train which struck plaintiff was due seven minutes later than a standing train beside which plaintiff was waiting for passengers to alight. Both trains had been reported on time, which fact plaintiff knew, but the train first due arrived five minutes late. There was room between the tracks so that a person could stand there unharmed while the trains passed. The headlight on the incoming train was lighted, and plaintiff could have seen the train had he looked, and heard it had he listened. He was thoroughly familiar with the time and manner of the trains' coming, being accustomed to meet them as hotel porter. *Held*, that the plaintiff was guilty of contributory negli-

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\*As to speed in violation of ordinance as negligence, see *Jackson v. Kansas City, etc., R. Co.*, 19 Am. & Eng. R. Cas., N. S., 99, and *note*, 119.

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gence as a matter of law, so as to preclude a recovery for injuries received.

**Same—Same—Wantonness.\***—Defendant's servants were not guilty of such willful, reckless, or wanton disregard of human life as to render defendant liable for plaintiff's injuries despite his contributory negligence, because the train entered the depot at a speed slightly in excess of the ordinance, and the engineer could have seen the place on which plaintiff was struck in time to have stopped the train before reaching it.

Appeal from circuit court, Pettis county; George F. Longan, Judge.

Action by S. P. Tanner against the Missouri Pacific Railway Company. From a judgment in favor of the plaintiff, defendant appeals. Reversed.

M. L. Clardy and Wm. S. Shirk, for appellant.

J. H. Rodes, Sangree & Lamm, and Barnett & Barnett, for respondent.

Brace, P. J. This is an appeal by the defendant from a judgment of the circuit court of Pettis county in favor of the plaintiff for the sum of \$7,000 for personal injuries which, it is alleged in the petition, were caused by the negligence of the plaintiff in running its train at a rate of speed in excess of that allowed by city ordinance and without ringing its bell. The answer was a general denial and a plea of contributory negligence. At the close of plaintiff's evidence, the defendant demurred thereto, and at the close of all the evidence renewed its demurrer, and now insists that the trial court committed error in not sustaining the demurrer. This contention makes it necessary to determine the undisputed facts in the case, and, if upon them it is well grounded, the necessity of considering the other errors assigned is obviated.

The accident occurred on the 2d day of March, 1897, between 1 and 2 o'clock a. m., on the grounds of the defendant in front of its depot in the city of Sedalia. The depot fronts south, with a wooden platform extending south to the tracks. Along and in front of the platform, and on a level with it, are located five tracks, running east and west, numbered 1, 2, 3, 4, 5, from the platform, which extends across and between two or three of the tracks. South of the tracks, and in front of the depot, Osage street, 60 feet wide, running north and south, abuts the depot grounds, and forms one of the principal approaches to the station, to reach which all five of these tracks must be crossed. On the northwest corner of Osage street, fronting the depot grounds and tracks, is the Pacific Lunch Room. On the night in question the plaintiff was in the employ of the City Hotel as night clerk, and discharging

\*See generally, *Ulrich v. Cleveland, etc., Ry. Co.*, 13 Am. & Eng. R. Cas., N. S., 783, and *foot-note*.

the duties of porter for that hotel. Passenger train No. 9, coming from the east on track No. 1, was due at 1:43 a. m. Passenger train No. 10, coming from the west on track No. 2, was due at 1:50 a. m. The track is straight and level, and the headlight of a coming engine on it can be seen a half mile from the place of the accident. The bulletin board showed these trains on time. In fact, No. 9 came in about five minutes late, and No. 10 on time. The plaintiff, in the line of his employment, was in the Pacific Lunch Room, awaiting the arrival of these trains. The story of his injury is told by him in his evidence as follows:

In chief: "Q. You may state what you did after you got there,—to the lunch room. How long you stayed there, and how you came to go there, if you did, to meet number nine. A. I went over, and went in the side door to the lunch room, where we generally stopped out of the rain or cold weather, and stop in there occasionally when the train is not in sight or hear it coming. We drop inside there at the restaurant, and stop in there, and talk a few minutes, until the train comes; and we was all standing in there, talking. Some one said the train was coming. Q. Had there been anything said in there about the bulletins of the two trains before that? A. Well, it was reported number nine on time. Q. How about number ten? A. Both on time; that was the report. Q. Marked where, at the bulletin at the depot? A. Yes, sir; I didn't go over myself, but it was reported there among the hack drivers and the porters that number nine and ten was on time. Q. Now go on in your own way. A. And, when number nine was coming in,—we heard it coming in,—we all went out. I say, 'All;' several went out. Some went out the side door, and some the back. I went out the back door, and it was raining. You have to go east a little bit to get on the sidewalk,—the back door of the restaurant,—and I went north — Q. Did you go east when you stepped out of the back door of the restaurant? A. Had to go east to get to the corner of the building,—sidewalk. Q. Then how did you go when you got to the corner of the building,—to the sidewalk? A. I went north. Q. Where did you go,—north? A. I went north to the platform between number one and two track, where number nine and ten runs in on. Q. How long were you in there before number nine came in? A. Why, I just got there, and number nine came in. Q. From the east? A. From the east, by me. Q. Go on, from that; and, by the way, when you went across this track that number ten finally came in on, state whether you looked or not,—if you looked. A. Yes, sir; I looked west. Q. Did you see anything that indicated a train coming? A. No, sir; nothing but some switch lights up there. They don't give no such light as an engine, you know. \* \* \* Q. Then you crossed on over this track that number ten finally came in on, and got in between tracks

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number one and two? A. Yes, sir. Q. On which side of number nine were you when number nine came in? A. On the south side. Q. How wide is that platform between tracks one and two? I don't mean when the trains are in, but before they come in. How wide is the space between the rails? Give us your judgment. A. I couldn't say. Q. You never measured it, but give us your judgment about it. A. I judge, seven or eight feet there. Q. When trains come in, I suppose the cars project over the rails to some extent. How wide would the space be when two trains were standing in there, do you think? A. I judge it would be four or five feet. Q. Now, after number nine came in from the east, you say you had your umbrella up? A. Yes, sir. Q. How did you hold your umbrella? A. Up over my head. It was raining. Q. What did you do after number nine came in? A. I was standing there waiting for passengers to get off. Q. Had you moved up east some? A. I may have stepped up a few steps. The smoking car is about middle way where I was standing. Q. What do you mean by that, —the smoking car? A. That is the first coach. Q. And you mean that you were standing about the middle of the smoking car? A. Yes, sir; when the people were getting off. Q. If we knew where that car stood, we would be able to locate you. Do you know where that car stood? A. I think it was partly across Osage. I was standing on the platform between Osage, or on Osage. Q. You think you were standing on that platform where Osage, if it went through, would have gone right where you were? A. Yes, sir. Q. Well, what happened to you? A. The first thing I knowed, why— Q. How long had you been over there before number ten came in? A. I had been standing there, I guess, a minute and a half or two minutes. Q. What were you doing during that time? A. Standing there looking for passengers to get off. Q. Were you on the track that number ten came in on, do you think? A. No, sir; I don't think I was on the track. Q. What happened to you then? A. The train ran into me. Number ten run into me, and took my leg off. Q. Did you hear it before it struck you? A. No, sir. Q. Did it ring any bell,—the engine on number ten? A. No bell ringing. Q. You never saw it before it struck you? A. No, sir. Q. Which leg was it the train took off? A. Left leg. Q. Do you know whether your leg was taken off after you was thrown down, or was it hurt before you fell down? A. I couldn't say. It was taken off. I didn't know how it was taken off. Q. You were facing what direction when number ten struck you? A. I was facing northeast. Q. Your right side would be towards number ten as it came in, in a measure? A. Yes, sir. Q. You were facing northeast? A. Yes, sir; this direction. Q. And that would bring your right side, in a measure, at any rate, towards the track which was on the south of you? A. Yes, sir. Q. Now it was your left leg that was cut off? A. Yes, sir. Q. Whether you were knocked down, and after



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you were knocked down, your foot got under the car, or whether your foot was struck in the first instance, you really don't know? A. Don't know how it was done, no, sir. \* \* \* Q. When you were on this platform,—that is, between these two tracks,—do you remember of seeing other people in there at that time? A. The hack drivers and porters was east of me. They were standing at the opening between the two cars. Q. On which side of number nine? A. On the south side. Q. Of number nine? A. Yes, sir. Q. Standing east of you, as I understand you? A. Yes, sir. Q. How far, I suppose, you don't know? A. I couldn't say how far east they were. They were down east. I wasn't paying any attention. I was watching to see who was going to get off the train. Q. Mr. Tanner, while you had been attending over there as a porter, from time to time, on which side of the incoming trains did you get passengers and take passengers to the trains? A. To the south side. Q. South side? A. Yes, sir."

On cross-examination: "Q. You were perfectly familiar with the manner at which these trains came in, and at the time at which they came, and had been for months before that? A. Before I was hurt; yes, sir. Q. You knew that number nine came in from the east seven minutes ahead of number ten from the west, when they were both on time? You knew that fact? A. Yes, sir. Q. You say it was reported to you this night that you went over there that number nine was on time and number ten also? A. It was reported there in the restaurant; yes, sir. Q. As you went out after hearing number nine coming, did you look at your watch to see whether she was coming on exact time or not? A. I did not. Q. You thought it was coming in on time, from the report that you heard? A. That is what the bulletin board showed, I think. Q. But from what you heard in the saloon— A. Restaurant. Q. You thought it was coming in on time? A. Yes, sir. Q. And you thought that number ten would not come in for the next seven minutes? A. Of course, number ten wouldn't come in for seven minutes. \* \* \* Q. Did you not also say that, not expecting number ten for seven minutes yet, you was not looking for it, nor listening for it, at the time you were injured? A. Was not looking for it. If I had been looking for it, I would have seen it before it got on to me. \* \* \* Q. After you got across the track that number ten was coming in on, you say you stood there for a minute and a half or two minutes before number ten came in? A. Yes, sir; number nine passed right by us. Q. And in a minute and a half or two minutes after that number ten came in and struck you? A. Yes, sir. Q. During that minute and a half you was standing on that track that number ten come in on, did you turn and look out west to see if a train was coming? A. I don't remember whether I looked west any more than once or not. Q. You think you looked west as you came across the track. Now,

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in this minute and a half or two minutes after you got across the track, did you again look west to see whether that train was coming? A. No, sir; I don't think I did. Q. Did you listen to see if you could hear it? A. No, sir; I didn't expect it. Q. And therefore paying no attention as to whether it was coming or not? A. I was standing there on the platform waiting for guests to get off. \* \* \* Q. During the minute and a half that you stood there after you got across the track, and you say you was looking for passengers getting off of number nine, was you paying attention to whether or not train number ten was coming in from the west? A. No, sir; I was not. I didn't look. I didn't turn around and look. \* \* \* Q. Was you looking? If you was not looking, was you listening? A. I was not deaf. Q. Was you listening to see if that train was coming during that minute and a half you stood there on that platform? You was not, was you? A. I was not paying—I didn't hear anything. If I had heard, of course— Q. That is not the question. You understand what I mean. Was you listening? Was your ears open to hear whether or not that train was coming? A. I didn't hear it; no, sir. Q. You know that is not an answer to my question. \* \* \* Was you listening with a special view to ascertain whether that train was coming or not? A. Why, well, I'll have to say I reckon I didn't. \* \* \* Q. Anything the matter with your ears that night? A. No, sir. Q. You cannot explain why you didn't see that locomotive headlight? A. I cannot explain it. I could have seen it if I had looked. Q. You could have seen it if you had looked, and your eyes were all right? A. My eyes were all right, certainly. Q. You didn't hear any one hollering at you on the other side of number ten. Was there anything the matter with your ears that night? A. No, sir. Q. Your ears were in good condition? A. Yes, sir. Q. You had an umbrella up over your head? A. I did."

As there was some evidence tending to prove that train No. 10, coming in on track No. 2, was running at a rate of speed exceeding the maximum rate prescribed by the city ordinance, and that its bell was not being rung, the court committed no error in sending the case to the jury, unless by these undisputed facts such contributory negligence on the part of the plaintiff is shown as to preclude a recovery. That it is so shown is a conclusion as to which reasonable minds cannot well differ. The plaintiff, an adult in possession of all his faculties, familiar with the place, the time, and movement of these trains, without looking or listening, or paying any attention thereto whatever, deliberately placed himself in the line of danger of train No. 10, coming in on track No. 2, on time, and is struck, when by looking he could have seen, and by listening he could have heard, that incoming train, and have avoided the danger to which he thus voluntarily and unnecessarily exposed himself. A clearer case of contributory negligence could not

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near Track—  
Failure to Look  
or Listen.**

well be made out. The only shadow of an excuse for such negligence is that he had heard that the bulletin said that both trains were on time, and, if this was so, then, No. 9 having just come in, No. 10 would not be in for seven minutes. Hence he paid no attention to his danger from that train. He took no care whatever to verify this report; did not even look at his watch for that purpose. If he had, he would doubtless have discovered that No. 9 was in fact late, and that No. 10 was then nearly due. However that may be, while bulletins are required by law, and serve useful purposes, they can, at best, do no more than predict—suggest a probability—as to the arrival of trains, and no man has a right to shut his eyes, close his ears, and put himself in a place of danger on or near a railroad track on the faith of such a forecast. No reasonably prudent man will do so. Hence it must be held that the plaintiff was guilty of such contributory negligence, in being within the danger line of track No. 2 when he was struck, as to preclude a recovery, and that the court committed error in sending the case to the jury, unless, after the plaintiff had thus put himself in a place of danger, the conduct of the defendant's employees in the management of the train was characterized by such willful, reckless, or wanton disregard of human life as that the defendant shall not be heard to say that the plaintiff was guilty of such negligence. *Morgan v. Railroad Co. (Mo.)* 60 S. W. 195; *Kellny v. Railway Co.*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783.

We have looked in vain through all the evidence in this voluminous record for any indicia of such willful, reckless, or wanton disregard of human life upon the part of defendant's servants.

There was barely evidence enough to take the case to the jury on the main issues tendered by the plaintiff, and, while there was some evidence from which the jury might have found that the train came into the depot grounds at a rate of speed slightly in excess of that prescribed by the ordinance, there is none to indicate a reckless rate of speed. It is also true that there was ample evidence from which the jury could have found that the place at which the plaintiff was struck was plainly visible to the defendant's operatives on the engine a sufficient distance for them to have safely stopped the train before it reached that place. But, conceding all this, what would have been seen by the defendant's servants at that place? No person on track No. 2, on which the train was moving; the plaintiff and several other persons on the platform between that track and track No. 1, on which train No. 9 was standing, presumably prudent persons, having a proper regard for their own safety; and, if any of them were within the line of danger from the approaching train, that they would be on the lookout for it, and would step out of its way as it approached them, and leave the way clear, and hence there would be no necessity for stopping the train on their account before reaching the usual stopping place, some 200

Same-Same-  
Wantonness.

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or 300 feet distant, where it did stop. This would have been the conclusion of an ordinarily prudent manager of the movement of such a train, and the defendant's servants, thus managing the train in question, cannot be convicted of a willful, reckless, or wanton disregard of human life, in not stopping the train before it reached the place where plaintiff was struck, because, forsooth, he proved to be an imprudent person, without a proper regard for his own safety, and did not step out of the way of the train, as he might easily have done, and as he would have been reasonably expected to do. The demurrer to the evidence ought to have been sustained. Hence it becomes unnecessary to consider the other errors assigned, and the judgment of the circuit court, for this error, will be reversed. All concur, except Marshall, J., absent.

## ILLINOIS CENT. R. CO.

v.

## O'CONNOR.

*(Supreme Court of Illinois, Feb. 20, 1901.)*

[59 N. E. 1098.]

**Injury to Trespasser—Failure to Observe Ordinance—Absence of Wantonness and Willfulness—Liability.\*—Chicago City Ordinances, art. 51, § 2459, requires railroad trains running at night to display a conspicuous light, and another ordinance requires a bell to be continuously sounded. Plaintiff was crossing the right of way of defendant railroad company at a point commonly used as a crossing to the knowledge of the company's employees, and was accidentally struck by a moving train. Held, that the company's failure to observe the above ordinances was not such wanton or willful negligence as would enable plaintiff, as a trespasser, to recover, and the refusal of a peremptory instruction for defendant was error.**

**Trespassers—Persons Crossing Track—Effect of Mere Failure to Object.†—The fact that at a certain point in a populous city persons commonly enter on the right of way of a railroad company for the purpose of crossing its tracks, to the knowledge and without the active**

\*As to whether the failure to comply with municipal ordinances prescribing precautions to be observed in running railroad trains is negligence *per se*, see *Jackson v. Kansas City, etc., R. Co. (Mo.)*, 19 Am. & Eng. R. Cas., N. S., 99, and *note*, 119; *Schneider v. Northern Pac. Ry. Co. (Minn.)*, 19 Am. & Eng. R. Cas., N. S., 314, and *note*, 319 *et seq.*

As to whether a trespasser has a right to complain of the violation of such an ordinance, see *Cleveland, etc., Ry. Co. v. Tartt (C. C. A.)*, 18 Am. & Eng. R. Cas., N. S., 226, and *foot-note*.

†See *Morgan v. Wabash R. Co. (Mo.)*, 20 Am. & Eng. R. Cas., N. S., 372, and *extensive note*, 394 *et seq.*

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interference of the company's employees, does not constitute one so doing anything more than a mere trespasser, or charge the company with any greater degree of care to avoid his injury than it owes to trespassers generally.

Appeal from appellate court, First district.

Action by Peter J. O'Connor, by his next friend, against the Illinois Central Railroad Company. From a judgment of the appellate court, First district (90 Ill. App. 142), affirming a judgment in favor of plaintiff, defendant appeals. Reversed.

W. A. Howett (J. G. Drennan, of counsel), for appellant.

James C. McShane, for appellee.

Wilkin, J. This is an appeal from a judgment of the appellate court for the First district affirming a judgment of the circuit court of Cook county in favor of appellee and against appellant. The action was for a personal injury to Peter O'Connor. The declaration in some of the counts charged the defendant with wanton and willful negligence in causing the injury, and in others with mere negligence. The plea was the general issue, and the trial by a jury, the verdict being for \$15,000, one-half of which was voluntarily remitted by the plaintiff, and judgment entered for \$7,500. At the close of plaintiff's evidence, and again at the close of all the evidence, the defendant requested the court, in writing, to instruct the jury to find for it, both of which requests were refused. In the appellate court several errors were assigned upon the record, all of which were overruled. Upon this appeal but a single question is presented for our decision, and that is whether or not the trial court erred in refusing to give the peremptory instruction to find for the defendant. The correctness of the ruling of the court in that regard, of course, depends upon whether or not there was any evidence introduced on behalf of the plaintiff, which, with all its legal inferences, fairly tended to establish the plaintiff's cause of action; and it is conceded that there could be no right of recovery except upon proof that the alleged injury was caused by a wanton and reckless disregard of duty on the part of the employees of the defendant company,—that is, wanton and willful negligence.

The cause of action is stated in the declaration substantially as follows: That defendant owned and was operating its railroad, running north and south along the shore of Lake Michigan, in the city of Chicago, embracing a number of tracks, on which many trains were running both day and night; that Twenty-Fifth street was a public highway running east and west, and open to travel as far east as the tracks of the defendant, but that there was no public highway across the tracks where a person could pass from the city to the lake shore, and that the only way in which the public could reach the lake shore was by crossing such tracks on a line due east

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of Twenty-Fifth street; that a great number of people, both daytime and evening, have been in the habit of crossing such tracks on a line east of Twenty-Fifth street, in order to go to and return from the lake shore, which use of the tracks was well known to, and not objected to by, the defendant; that section 2459 of article 51 of the ordinances of the city of Chicago provides that every locomotive engine, railroad car, or train of cars running in the nighttime on any railroad track in said city shall have and keep a bright and conspicuous light on the forward end of such engine, car, or train of cars, and if such engine or train shall be backing it shall have a conspicuous light on the rear car or engine; that another ordinance of the city provided that the bell of each locomotive engine should be rung continually while running in said city, except at certain places, not claimed to be where this injury occurred; and that it was the duty of the defendant, on account of said ordinances, while operating its trains, to maintain such light for persons who might be crossing the tracks at such point, and to ring a bell as required, but that, disregarding such duties, and while backing a train of cars along such tracks in the evening, after dark, the defendant willfully, wantonly, recklessly, and negligently failed to keep such brilliant and conspicuous light on the forward end of such train, and failed to ring said bell, and as a result thereof the plaintiff, who was a minor of the age of 14 years, while crossing the tracks on a line due east of Twenty-Fifth street, coming from the lake shore, between 8 and 9 o'clock in the evening, after dark, and while he was in the exercise of ordinary care and caution, was knocked down and injured by one of defendant's trains, etc.

There is no dispute in the evidence, as there could not be under this declaration, that the place of the injury was upon the defendant's right of way, and not on a public street. The evidence shows that west of the railroad right of way, across the foot of Twenty-Fifth street, and extending north and south, there was a stone wall separating the defendant's yards from the public streets of the city. There is no controversy as to the fact that in the summer season, during warm weather, a greater or less number of persons were in the habit, and had been for several years, of crossing the defendant's grounds from the foot of Twenty-Fifth street due east to the lake for purposes of bathing, fishing, etc., and that this fact was known to the defendant and to the employees operating the train at the time of the accident. On the evening in question the plaintiff, with other boys, had gone to the lake shore, crossing the stone wall at Twenty-Fifth street and the right of way of defendant, for the purpose of swimming in the lake. He attempted to return by the same route about 9 o'clock at night, and when on one of the tracks of the defendant he was struck by a flat car which was being backed northward. The evidence was conflicting as to the speed at which the car was

moving, and also whether the ordinances set out in the declaration, or either of them, were being observed; but the evidence tended to show that the speed of the backing train was some seven or eight miles an hour, and that no lights were displayed upon the rear car, or bell rung or other warning given. There was no evidence to the effect, nor is it claimed, that any of the employees of the defendant in charge of the train saw or had actual knowledge of the fact that the boy was on the track or right of way. There is no evidence tending to show that the place at which the injury occurred was other than strictly the private grounds, track, and right of way of the defendant; that is, there was no evidence tending to show that the place was in use as a public street, or that it was open to the public. In other words, it is not denied that the plaintiff was, at the time he received his injury, a trespasser upon the track of the defendant. But plaintiff seems to have rested his case upon the theory alleged in his declaration, that the fact that numerous persons were in the habit of crossing the defendant's tracks at this place, which was known to its servants operating the train, together with the fact that no lights were displayed and no bell rung, tends to prove wanton and willful negligence on the part of those employees.

It is a general rule that, in order to maintain an action for injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This court is committed to the doctrine that a railroad company, in the operation of its trains, owes no duty to a trespasser upon its right of way or tracks, except that it will not wantonly or willfully inflict injury upon him; and we have frequently held that the mere fact that signals required by statutes and ordinances are not given, even though those operating its trains may have knowledge of the fact that persons have been in the habit of crossing its tracks or walking upon them at places other than public crossings or public places, will not amount to proof of willful and wanton disregard of duty towards such trespassers. We said in Railroad Co. v. Godfrey, 71 Ill. 500, on page 506: "The right of way was the exclusive property of the company, upon which no unauthorized person had a right to be for any purpose. The plaintiff was traveling upon defendant's right of way, not for any purpose of business connected with the railroad, but for his own mere convenience, as a footway, in reaching his home on return from a search after his cow. There was nothing to exempt him from the character of a wrongdoer and trespasser in so doing, further than the supposed implied assent of the company, arising from their non-interference with a previous like practice by individuals. But, because the company did not see fit to enforce its rights and keep people off its premises, no right of way over its ground was thereby acquired.

**Injury to Trespasser—Failure to Observe Ordinance—Absence of Wantonness and Willfulness—Liability.**

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It was not bound to protect or provide safeguards for persons so using its grounds for their own convenience. The place was one of danger, and such persons went there at their own risk, and enjoyed the supposed implied license subject to its attendant perils. At the most, there was here no more than a mere passive acquiescence in this use. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident. *Sweeny v. Railway Co.*, 10 Allen, 373; *Hickey v. Railway Co.*, 14 Allen, 429; *Railroad Co. v. Hummell*, 44 Pa. St. 375; *Gillis v. Railroad Co.*, 59 Pa. St. 129." In *Railroad Co. v. Hetherington*, 83 Ill. 510, the foregoing language was quoted with approval; and in the still later case of *Blanchard v. Railway Co.*, 126 Ill. 416, 18 N. E. 799, the question there being whether the trial court had properly instructed the jury to return a verdict for the defendant, the same doctrine was reannounced, and we there said (page 424, 126 Ill., and page 803, 18 N. E.): "The plaintiff in this case has not shown that the conduct of the defendant or its servants was wanton or willful. The proof tends to show that the engine was moving at a rate of speed greater than that permitted by the city ordinance. This circumstance might well have been considered by the jury in determining whether the defendant was guilty of such negligence as caused the death of the deceased, if the latter had been lawfully upon the track or had otherwise been in the exercise of ordinary care. But in the *Hetherington Case* the following language was used: 'While it is true the railroad company was running its train at a greater rate of speed than allowed by the ordinance of the city of Chicago, yet that fact did not relieve the deceased from the exercise of ordinary care; nor can the speed of the train alone be regarded as furnishing a sufficient reason for holding that the injury was willful or wanton.'" It is true that some courts have held that, where a railroad company has for a considerable length of time permitted the public to cross its tracks at given points without objection, it owes the duty of reasonable care towards those so using the crossing. *Taylor v. Canal Co.*, 113 Pa. St. 162, 8 Atl. 43; *Barry v. Railroad Co.*, 92 N. Y. 289; *Byrne v. Railroad Co.*, 104 N. Y. 362, 10 N. E. 539; *Swift v. Railroad Co.*, 123 N. Y. 645, 25 N. E. 378. But, as shown above, we have held, in accordance with the rule laid down by Elliott in his work on Railroads (3 Elliott, R. R. § 1252): "Mere sufferance or passive acquiescence in the occasional use of the track between crossings does not necessarily amount to a license, and, where nothing more is shown, one who so uses the track is a trespasser." *Id.* § 1248. There is a line of decisions by this court holding, in effect, that, even though a party may be upon the defendant's tracks or right of way without an absolute right to do so, yet where the place "has been openly used

Trespassers—  
Persons Cross-  
ing Track—Effect  
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jointly by the railroads and the public," and where, from the evidence, the ownership of the place is left in doubt, as in the case of *Railroad Co. v. O'Neil*, 172 Ill. 527, 50 N. E. 216, or at a place on a public street or on the "planked tracks adjacent thereto," as in *Railroad Co. v. Murowski*, 179 Ill. 77, 53 N. E. 572; or where the evidence tended to show that the place of the injury was in a public street of the city, as in *Railway Co. v. Bodemer*, 139 Ill. 596, 29 N. E. 692, the company owes to persons at such places the duty of exercising reasonable care to avoid inflicting injury upon them, and that in such cases the failure to give required signals may amount to wanton or gross negligence. But we are unable to see upon what principle the present case can be brought within the reasoning or decision in those cases. As we have before said, the plaintiff in this case was a trespasser. He was upon defendant's right of way and track, not upon any business with the defendant, not by any right or claim of right, but for his own convenience and pleasure. His declaration shows, and it is conceded by the evidence, that by putting himself to the inconvenience of walking a few blocks either north or south he could have crossed the tracks to the lake shore with safety.

On the decisions first above cited, we are of the opinion that there was no evidence before the jury proving or tending to prove that the defendant was guilty of gross negligence towards the plaintiff, and that the trial court erred in refusing the peremptory instruction to find for the defendant. The judgments of the circuit and appellate courts will be reversed, and the cause will be remanded to the circuit court, with directions to proceed in accordance with the views herein expressed. Reversed and remanded.

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TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err.,

v.

EMMA HUMBLE.

(Argued March 7, 8, 1901. Decided April 8, 1901.)

[21 Sup. Ct. Rep. 526.]

**Injury to Married Woman—Right of Action—Conflict of Laws—Effect of Removal into Federal Court.**—The right of a married woman to bring an action for personal injuries in her own name under Sand. & H. (Ark.) Dig. § 5641, is not lost by defendant's removal of the action into a Federal court, but the law of the state furnishes the rule of decision, under U. S. Rev. Stat. § 721.

**Appeal—Review.**—The contention that an action brought by a married woman cannot be maintained because the husband alone has the right to bring the action cannot be regarded in the Supreme Court of the United States, when the point was not presented in the court below.

**Injury to Married Woman—Right of Action—Conflict of Laws.**—The right of a married woman to sue in Arkansas in her own name for

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personal injuries, under Sand. & H. (Ark.) Dig. § 5641, extends to a woman injured in that state, but domiciled in Louisiana, where the damages claimed would constitute community property.

**Same—Same—Same—Right of Husband at Their Domicil.**—The possibility that a judgment obtained by a married woman in her own name for personal injuries, in an action brought in the state where she was injured, would not be recognized as a bar to an action by her husband in the state of their domicil for the same cause of action, will not preclude the court in her action, which is removed into a Federal court, from sustaining her right of action in her own name, in accordance with the law of the state in which she was injured.

**Same—Damages—Loss of Earning Capacity.\***—In an action by a married woman to recover damages for personal injury, under Sand. & H. (Ark.) Dig. § 5641, the impairment of her capacity to perform labor may be considered as an element of the damages, since the husband's right to recover for loss of services does not preclude her right to recover for the loss of her capacity to earn for herself.

**Adoption of Statute of Other State.**—The fact that the Arkansas statutes respecting the rights of married women (Sand. & H. Dig. §§ 4940, 4945, 4946, 4949, 5641) were nearly identical with the New York act of 1860 does not show that the prior construction of the New York act was adopted, where it is not shown that the statute was in fact adopted from New York, instead of from Massachusetts, where there was a similar statute in force.

**Injury to Married Woman—Damages—Loss of Earning Capacity.**—The right of a married woman to recover for loss of capacity to labor or earn money on account of a personal injury will not be denied because there is no evidence showing any capacity to labor or earn money at and just before she was injured, where it appears that she had been for some years in business on her own account, though it had been discontinued at the time of the injury on account of temporary illness.

In error to the United States Circuit Court of Appeals for the Eighth Circuit to review a decision affirming a judgment in an action by a married woman for personal injuries. Affirmed.

See same case below, 38 C. C. A. 502, 97 Fed. Rep. 837.

Statement by Mr. Chief Justice Fuller:

This was an action brought by Emma Humble against the Texas & Pacific Railway Company in the circuit court of Miller county, Arkansas, to recover compensation for personal injuries sustained by her in the defendant's station at Texarkana, Arkansas, on April 9, 1898, by reason of defendant's negligence, and removed on defendant's petition to the United States circuit court for the western district of Arkansas. Plaintiff obtained judgment, which was affirmed by the circuit court of appeals for the eighth circuit, 38 C. C. A. 502, 97 Fed. Rep. 837, and thereupon this writ of error was sued out.

The evidence, in addition to establishing the circumstances

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\*See generally, 8 Am. & Eng. Enc. Law (2d Ed.) 651 *et seq.*

of the infliction of the injury, tended to show that Mrs. Humble had been a resident of Arkansas for nearly ten years; that she had kept a boarding house and a hotel at Pine Bluff, in said state, for some years, conducted by her as her sole and separate business and in her name, until she left Pine Bluff for Texarkana, in October, 1897, where she remained until April 9, 1898, and during this time began to run a hotel, but became temporarily ill, and gave it up. Her husband had taken up his residence in Louisiana at the time of the injury, and she had then started to go to him.

Prior to the trial the railway company moved the court to compel Mrs. Humble to make her husband a party plaintiff, but the court overruled the motion, and defendant excepted. Defendant objected to all evidence tending to show that plaintiff's capacity to labor was diminished by the injury, and saved an exception to its admission.

At the close of the evidence defendant requested the court to give the jury certain instructions, of which the third, fourth, sixth, and seventh are as follows:

3. "The plaintiff cannot recover any damages on account of her injury diminishing her capacity to labor and earn money, because there is no evidence showing any capacity to labor or earn money at and just before she was injured."

4. "In this case the plaintiff being a married woman and her husband not joining in the suit, she cannot recover any damages on account of her diminished capacity to labor and earn money."

6. "The plaintiff being a married woman, and her husband not having joined her in this suit, and she and her husband having her present and prospective home in the state of Louisiana, then the law of Louisiana would apply as to the right to recover damages by reason of the fact that plaintiff's capacity to labor in future has been lessened by the injury, and by the law of that state she cannot recover such damages."

"You will therefore allow nothing as damages for any diminished capacity to labor and earn money."

7. "Plaintiff cannot recover anything on account of her diminished capacity to labor."

"Because there is neither pleading nor evidence showing that plaintiff was engaged in any business, profession, or occupation."

"And her lessened capacity to perform household duties cannot be the basis of plaintiff's recovery."

The court declined to give these instructions, and each of them, and the defendant excepted to the refusal of each.

The court instructed the jury as follows: "If you should find for the plaintiff, in assessing her damages you will take into consideration her age and earning capacity before and after the injury was received, as shown by the proofs, her physical condition before the injury, and her physical con-

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dition after the injury, and the nature and character of the injury she received, whether it be permanent or temporary in its nature, and find for her such sum as will fairly and reasonably compensate her therefor, including therein fair and reasonable compensation for any physical and personal pain and suffering she may have undergone as the result thereof."

Defendant excepted to so much of this portion of the charge as allowed the jury to "take into consideration her age and earning capacity before and after the injury was received as shown by the proofs."

Messrs. John F. Dillon, Winslow S. Pierce, and David D. Duncan for plaintiff in error.

Mr. Oscar D. Scott for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

Plaintiff in error contends that the judgment should be reversed because the circuit court erred in declining to direct the joinder of the husband; in applying the law of Arkansas in the trial of the case, and not that of Louisiana; and in allowing impaired earning power to be considered as an element of recovery.

The statutes of Arkansas provided that a married woman might "maintain an action in her own name for or on account of her sole or separate estate or property, or for damages against any person or body corporate for any injury to her person, character, or property." Sandels & Hill's Dig.

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eral Court.

§ 5641.

This action was brought in the state court, and removed on defendant's application. That transfer could not deprive plaintiff of the right secured to her by the local law to prosecute the suit in her own name and for her own benefit; and indeed by § 721 of the Revised Statutes, the law of Arkansas furnished the rule of decision. In some jurisdictions it is held under similar statutes that the wife must sue alone under such circumstances, and that to make the husband a coplaintiff works a fatal misjoinder. The circuit court was right, then, in not attempting to compel a joinder which the statute had expressly dispensed with.

But it is said that under the laws of Louisiana compensation for personal injuries to a married woman belongs to the husband; that he alone can sue therefor; and that, therefore, error was committed in the admission of evidence, the refusal of instructions, and in the charge of the court. We do not think the point as now presented was made below. The objection to evidence, the sixth instruction refused (which referred to the law of Louisiana), and the part of the charge excepted to, related to diminished capacity to labor. And the motion as to Humble was that he should be joined as a plaintiff. The answer simply raised the issues whether or not Mrs. Humble received

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any injuries to her person by reason of the acts complained of. It was nowhere insisted that the action could not be maintained because not brought by the husband alone.

However, whether the objection be that under the laws of Louisiana she could not recover in her own name at all, or could not, except her husband was a coplaintiff, because the

damages claimed were community property we agree with the circuit court of appeals that plaintiff's rights in suing in Arkansas for an injury sustained there did not differ from those of any married woman domiciled in that state; that the legislature of Arkansas had determined by whom a suit might be brought for personal injuries sustained by a married woman; had enlarged the rights of married women in respect of damages recoverable by them on account of personal injuries sustained within the state; and that these laws necessarily inured to the benefit of every married woman who subsequently sued in the courts of the state for personal injuries there sustained, and must be held to have been intended to have, and to have, a uniform operation throughout the state.

The argument ab inconvenienti is pressed that Humble might sue for the same injury in Louisiana, and that this judgment could not be pleaded in bar, although only covering damages particularly pertaining to the wife. In other words, that the Louisiana courts would decline to give any faith and credit to the recovery in Arkansas permitted by the jurisprudence of the latter state in the name of the wife only. We must decline to be moved by the supposed hardship suggested. These injuries were inflicted and this action was brought in the state of Arkansas. The place of the wrong and the place of the forum concurred, and the law of that place governed. If an action should be brought in Louisiana, the fact that the law of Arkansas differed from that of Louisiana would not prevent its application, unless opposed to some general public policy, the existence of which is not to be assumed. Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. Ed. 958, 14 Sup. Ct. Rep. 978.

This brings us to the point on which the chief stress of the argument was laid. The circuit court charged the jury that if they found for plaintiff they might take into consideration in assessing the damages "her age and earning capacity before and after the injury was received, as shown by the proofs," and refused an instruction to the contrary; and exceptions were duly preserved.

In view of the evidence, was plaintiff entitled to be allowed anything for diminution of earning capacity?

Section 7 of article 9 of the Constitution of Arkansas provides:

"The real and personal property of any feme covert in this

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Capacity.

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children, which business had been discontinued for a few months, was renewed, and then given up on account of temporary illness, from which she had in substance recovered, when the injuries sustained incapacitated her from further work.

Under these circumstances we think the circuit court did not err in refusing to charge that plaintiff could not recover for diminished capacity to labor because there was "no evidence showing any capacity to labor or earn money at and just before she was injured." To pin the evidence of capacity down to the very point of time when the injury was inflicted upon her was refining too much on the principle involved.

This loss of ability to make earnings outside the discharge of household duties and irrespective of her husband was, under the statutes of Arkansas, her loss, and not her husband's, and the mere fact that at the moment of the injury she happened to be out of business should not deprive her of the benefit of the rule which would have been otherwise applicable, according to *Filer v. New York C. R. Co.* and *Brooks v. Schwerin*.

We have assumed, as the jury presumably did, that the earning capacity referred to in the charge had relation to earnings on plaintiff's own account; and if defendant wished this to have been made more explicit, it should have so requested.

The third paragraph of the seventh instruction refused was, "And her lessened capacity to perform household duties cannot be the basis of plaintiff's recovery." But this was not asked as an independent proposition, and the exception was saved to the refusal to give the entire instruction, which as a whole was erroneous and properly refused.

We find no reversible error, and the judgment is affirmed.

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NORTHERN COUNTIES INV. TRUST, Limited,

v.

ENYARD *et ux.* (NORTHERN PAC. RY. CO., Intervener).

(*Supreme Court of Washington, March 30, 1901.*)

[64 Pac. Rep. 516.]

**Railroads—Right of Way—Adverse Possession or Permissive—Occupation.\***—Where the grantors of plaintiffs in ejectment occupied, cleared, fenced, and cultivated land for over 10 years, which was subject to a railroad right of way, such occupation was not adverse, but permissive, since it was not inconsistent with such right of way, and hence the railroad's easement was not extinguished by plaintiff's possession.

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\**Pittsburgh, etc., Ry. Co. v. Stickley (Ind.)*, 20 Am. & Eng. R. Cas., N. S., 148, and *note*, 151 *et seq.*

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Appeal from superior court, Cowlitz county; A. L. Miller, Judge.

Action by the Northern Counties Investment Trust, Limited, against A. J. Enyard and wife, defendants, and the Northern Pacific Railway Company, intervener. From judgment for defendants and intervener, plaintiff appeals. Affirmed.

Ballou & Murdoch, for appellant.

Crowley & Grosscup and A. G. Avery, for respondents.

Reavis, C. J. In July, 1870, Angelica Gill received a final certificate of entry for certain lands in Cowlitz county, and on December 7th following she executed and delivered to the Northern Pacific Railroad Company her deed for a right of way for the construction of railroad and telegraph lines of 200 feet of land on each side of the railroad as located and to be located across her premises. The deed contained the usual covenants of warranty, and was duly placed of record. The railroad company, in the latter part of the year 1871, located its line of road across the premises, and constructed and completed its road in 1872, and the railroad and its successor, the Northern Pacific Railway Company, respondent, have ever since continued to operate its railroad through said premises. On the 22d of March, 1873, Angelica Gill conveyed by deed of warranty the same premises to one Pumphrey, who, upon the delivery of the deed, entered into actual and open possession of the premises conveyed to him, and during such time continued in possession, cleared the land, and reduced it to a state of cultivation for farming purposes, and, upon entering into possession of the land, fenced and closed the same up to within 25 feet of the track of the railroad line, and his possession was peaceable and undisturbed for more than 10 years. In May, 1890, Pumphrey executed a mortgage to the Lombard Investment Company, covenanting that he had a valid title in fee simple to the premises so mortgaged. The Lombard Investment Company assigned the mortgage, with the debts secured thereby, to appellant, and appellant foreclosed the mortgage, and became the purchaser of the mortgaged premises, and in November, 1897, received a deed from the sheriff for said premises. The area in dispute consists of a strip of land 175 feet wide on each side of the line of the railroad company. In the fall of 1896 the respondent railway company went into possession of the strip of land in dispute, and leased it to the respondents Enyard and wife, who have been in possession of the premises as tenants since that time, using the land for ordinary farming purposes. Appellant, in August, 1898, commenced the action in ejectment against Enyard and wife to recover possession of the strip of land in controversy. The railway company intervened as the landlord of Enyard and wife. The principal facts were stipulated at the trial, in addition to which appellant introduced testimony relative

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to the possession, from which it appeared that Pumphrey, after the delivery of the deed from Gill to himself, cleared the strip of land in controversy; that in 1875 he put a rail fence along the land he occupied; and that he raised hay and grain and farmed generally. The railroad line was in the same place as where it was originally located. It also appeared that no objection to his occupancy of the strip was made by the railway company. At the conclusion of the trial the court withdrew the cause from the consideration of the jury, and entered judgment for respondents, dismissing the cause.

Appellant relies for title upon adverse possession. Counsel maintain that when the period of limitation has run a new title is created, and under such title the owner may maintain an action of ejectment to quiet title under general allegations of ownership. A number of authorities are cited to sustain the principle, including *Raymond v. Morrison*, 9 Wash. 156, 37 Pac. 318, and *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525. The correctness of this position may be conceded. But this proposition is answered by respondents' contention that the possession of appellant was not adverse; it was permissive; that the mere occupancy of a portion of the right of way of a railroad company by the owner of the servient estate is not inconsistent with the easement. Some of the authorities cited by appellant are to the effect that "the right acquired by the corporation, though technically an easement, yet it requires for its enjoyment a use of the land permanent in its nature, and practically exclusive." *Hazen v. Railroad Co.*, 2 Gray, 574; *Hurd v. Railroad Co.*, 25 Vt. 116; *Jackson v. Railroad Co.*, Id. 150; *Railway Co. v. Allen*, 22 Kan. 285; *Railroad Co. v. Godfrey*, 71 Ill. 500. It is true that the right of way of a railroad company for the operation of a line of railroad and telegraph lines has some of the attributes of ownership of the fee. The possession of the right of way when required for some of the uses of the company must be practically exclusive for those uses. But the right of way of the railway company here is designated in the act of congress of July 2, 1864, incorporating the Northern Pacific Railroad Company, as a right of way. The deed from Gill to the railroad company is designated a right of way. The grant in the deed was evidently of an easement. The dominant estate for such uses as were not inconsistent with the uses of the right of way and the fee still remained in the grantor. Washb. Easem. (4th Ed.) p. 291. It seems to be the general rule that a right of way lying in grant is not lost by non-user. *Pope v. O'Hara*, 48 N. Y. 446. It would seem, at any rate, to require some act upon the part of the owner of the servient estate which actually prevents the use of the right of way when required for the purposes of the railroad company, to give notice of adverse claim of right. *Noll v. Railroad Co.*, 32 Iowa. 66; *Slocumb v. Railroad Co.* (Iowa) 11 N. W. 641.



Relative to the right of the railroad company to the entire width of 400 feet for right of way, a full discussion is found in *Railroad Co. v. Smith*, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157, and, also, *New Mexico v. Trust Co.*, 172 U. S. 171, 19 Sup. Ct. 128, 43 L. Ed. 407. In *Railway Co. v. Telford* (Tenn. Sup.) 14 S. W. 776, it was observed: "The use by Telford of the condemned land alongside of the railway company for agricultural purposes, so long as the same was not required for a purpose of convenience or necessity by the railway company, was a use entirely consistent with his right as the owner of the fee, and was not incompatible with the easement granted the railway. It was a use not made under notice to the owners of the easement that its purpose was adverse to the easement, and it was not, therefore, adverse. The railway company had the right to terminate such use whenever they desired to put the land to a use incident to the operation of their railway." In *Railroad Co. v. Kindred* (Kan. Sup.) 23 Pac. 112, it was held that the occupation, cultivation, and inclosure by abutting landowners of the right of way granted by congress could not be considered as hostile or adverse, and must be regarded as permissive only. We observe no distinction between the right of way granted by congress and the right of way granted by the appellant in this regard. The uses for the right of way in connection with the operation of the railroad may be many. It may require a use for additional stations or side tracks. The company must so use its right of way as to reasonably prevent the communication of fires in the operation of its engines. Many of these uses, it will be observed, need not necessarily be made by the company when its line is first constructed. They must all be regarded, however, as in contemplation of the grant of the right of way. The clearing, cultivation, and fencing of a portion of the right of way not in use at the time would not seem to be inconsistent with the continuing rights of the company. We do not think the acts of possession of appellant's grantors were such as to notify the company of an adverse claim to the strip of land in controversy. Such occupancy and use by appellant may be regarded as permissive. We think upon this ground alone appellant has failed to show sufficient title to maintain its action. Arriving at this conclusion it is not necessary to discuss some other important objections argued by counsel for respondents. The judgment is affirmed.

Dunbar, Fullerton, and Anders, JJ., concur.

## ANDERSON

v.

## UNION TERMINAL R. Co. et al.

*(Supreme Court of Missouri, Division No. 1, Dec. 11, 1900.)*

[61 S. W. 874.]

**Railroads in Streets—Ordinances Regulating Operation—Validity—Acceptance by Railroad.**—It is error, in an action against a railroad for injuries received in an accident on its tracks in a city street, to permit ordinances regulating the manner of operating such lines therein to be given in evidence, without showing that they were accepted by the company.

**Harmless Error.**—The admission of erroneous evidence in a jury case is harmless error, where the court afterwards instructs that such evidence should be disregarded.

**Witnesses.**—Where a witness for plaintiff testifies on direct examination as to statements made by defendant, and testifies on cross-examination as to similar statements made by plaintiff's mother and sister, the plaintiff cannot contradict such latter statements, since he made the witness his own concerning the conversation with the mother and sister.

**Injury to Child—Negligence in Piling Cinders near Track.**—Where a railroad negligently allows a pile of cinders to remain by the side of its tracks, and a boy 9 years old stumbles over it and falls under a train, without negligence on his part, the negligence of the company is the proximate cause of the accident.

**Railroads in Streets—Duty to Keep Street in Repair—Liability for Negligence of Lessee.\***—Where a railroad company maintaining tracks in a city street, and required to maintain the street in repair for 20 years, leases its line under a contract requiring the lessee to maintain the tracks, a condition therein that the lessor renounces all duty to the public vitiates the lease; and hence the lessor is liable for injuries resulting from the negligent act of the lessee to allow an obstruction of the street.

**Same—Same—Same—Pleading.**—Where the answer of a railroad company owning a railroad in a city street admits placing a pile of cinders in a street, which caused the injury complained of, and the evidence shows that the cinders were placed there by a lessee which operated the road for the purpose of repairing the track, but that such repairs were paid for by defendant, it is not error to refuse to sustain defendant's demurrer to the evidence based on the ground that it is not liable for the acts of the lessee.

**Contributory Negligence of Minors.†**—Plaintiff was a boy 9 years of age, and his evidence showed that he was injured while attempting to

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\*See notes at end of case.

†See note, 19 Am. & Eng. R. Cas., N. S., 355 *et seq.*

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cross a railroad track on a city street; and by falling over a pile of cinders on the tracks of the company and rolling under the train while attempting to back away from the track in order to get out of the way of a train. Plaintiff saw the train at a considerable distance before he started towards the track. *Held*, in consideration of the boy's age, that it was not error to submit the question of contributory negligence to the jury.

**Instructions.**—Where an instruction given at plaintiff's request lacks a necessary element, such error is cured by an instruction, as given at defendant's request, which supplies such element.

**Same.**—An instruction in an action against a railroad for an injury received on its tracks is not erroneous because it authorizes a recovery if defendant's negligence was the cause of the injury, though "proximate cause" is the more accurate term.

**Same—Negligence—Definition.**—An instruction that negligence is the want of ordinary care, which is the care which is reasonably to be expected from an ordinarily prudent man in view of all the circumstances, is not erroneous, in not stating that the care should be the same as required of such a man under like circumstances, since there is no substantial difference in the meaning.

**Same.**—Where the evidence in an action against a railroad company shows that the injury complained of was caused by plaintiff falling over a pile of cinders while backing away from a train, and there is no evidence that he ever faced the cinders, it is not error to refuse to instruct that a verdict should be rendered for defendant if the cinders could have been easily seen by a boy of plaintiff's age while approaching and facing them.

**Same.**—Where the defendant in an action against a railroad company for an injury received on its tracks asks instructions submitting the question whether the plaintiff's age and capacity were sufficient to require him to do certain acts, it is not error to refuse instructions that the failure to perform such acts will prevent a recovery.

**Same.**—The refusal of requested instructions is not error, where the subjects to which they relate are fully covered by instructions given.

**Remarks of Counsel.**—The statement by counsel for plaintiff to the jury, in an action against a railroad company for an injury on its tracks, that the defendant was a "lawbreaker from the jump," is not sufficient to warrant a reversal of a judgment for plaintiff, where all the statements made by counsel are not shown by the record.

**Railroads in Streets—Pleading—Personal Injuries—Negligence in Piling Cinders near Track—Violation of Ordinance—Right of Recovery at Common Law.**—A petition in an action against a railroad company for injuries received on its tracks in a city street, which alleges that the company negligently maintained a pile of cinders which made the highway unsafe and caused the injury, will authorize a recovery at common law for defendant's negligence, though it is also alleged that the latter was violating an ordinance.

Appeal from circuit court, Jackson county; J. H. Slover, Judge.

Action by Otto Anderson, by next friend, against the Union

ANSWER - THE DEFENDANT'S ANSWER

Terminal Railroad Company and defendant. From a complaint  
in which it is alleged that defendant is liable for damages.

To the & to the Court of the State of Kansas, in and for the County of Kansas.

I, the undersigned, being duly sworn, depose and say that

ANSWER: The answer is returned by the defendant, The  
Terminal Railroad Company, in its own behalf, against the plaintiff,  
The Kansas City Southern Railway Company, in the following manner:

That on or about the 1st day of December, 1905, at Kansas City,  
Missouri, the plaintiff, James H. Smith, was injured by the defendant,  
The Kansas City Southern Railway Company, in the following manner:  
That the plaintiff was riding in a street car on the street of Kansas City,  
Missouri, at the time of the injury. The injury was caused by the  
negligence of the defendant in placing and maintaining in said street a pile of cinders and ashes  
which was used before a fire, and plaintiff recovered a  
sum of \$5,000. From this plaintiff demands and seeks

The defendant answered separately. Their answers, how-  
ever, set up the same defenses. After admitting the incorpora-  
tion of defendant, and generally denying the other allega-  
tions of the petition, the answers averred, in substance: First,  
That the track was laid under Ordinance 206 of Kansas City,  
Kan.; that it was new, unfinished and incomplete, and nec-  
essary to be ballasted and surfaced, and to accomplish such  
purpose the Union Terminal Railroad Company a short time  
before the injury in question caused to be scattered beside and  
along the track on Ohio avenue cinders, which were after-  
wards used for ballasting and surfacing same, but that same at  
no time constituted an obstruction to travel. Second. The  
plaintiff was guilty of contributory negligence, in that he neg-  
ligently approached so near the track without looking to see  
or listening to hear whether the train was approaching.  
Third. That plaintiff's injuries were caused by his attempt to  
climb upon a moving train, in violation of Ordinance 54,  
prohibiting such acts. The reply was a general denial of the  
new matter set forth in the answer. Briefly stated, the records  
present substantially the following case: The Terminal Com-  
pany constructed and owned a railroad track running at grade,  
east and west, in the center of Ohio avenue, in Kansas City,  
Kan. A double-track cable street railway was operated upon  
James street, which runs north and south, crossing Ohio avenue  
at right angles. The cable cars crossed the Terminal Com-  
pany's track at grade about every two minutes. The next  
parallel street west of James is Wood or First street, upon  
which were operated, at grade, the tracks of the Kansas City,  
Northwestern, and Chicago Great Western Railroads. The  
next parallel street to Wood was Armstrong avenue, or Second  
street. Between Armstrong avenue and Wood street the  
Terminal Company maintains a track on the south side of the  
street. The Suburban Company was organized on July 13,

1892, by a consolidation, under the laws of this state, of the Consolidated Terminal Railway Company and the Kansas City Suburban Belt Railway Company. Prior to the consolidation, however, the Terminal Company leased its road to the Consolidated Terminal Railway Company, and the latter agreed to maintain and operate the same. The evidence discloses that the railroad in question was constructed and put in operation in 1892 or 1893. The ordinance by virtue of which defendants occupied the street with a railroad contained grant to the Terminal Company and its assigns of the right to maintain and operate a road upon condition that the railroad company "shall plank and maintain all crossings of streets and alleys now laid out, or that may hereafter be laid out, across the tracks of said company, with three-inch oak plank, for the full width of said street and alleys, between the rails of its tracks, and for the space of three feet on the outside of the rail of its track, and also where said railway is built on Ohio avenue, said railroad shall plank the space between its tracks, and eighteen inches on either side thereof, the entire length of Ohio avenue occupied by said railroad except where said railway crosses streets and alleys, it shall be planked as aforesaid for the space of three feet on the outside of the track." It seems that this condition of the franchise was never complied with. A day or two before the accident in question the Suburban Company hauled a lot of cinders and dumped them at the side of the track on Ohio avenue, between Wood street and Armstrong avenue, and permitted them to remain in sloping piles, just as dumped from the train. Although this work was done by the Suburban Company, yet it appears that the expenses thereof were charged up to and paid by the Terminal Company. There was evidence tending to show that it was negligence in defendants to leave the cinders in the condition in which they were placed. It further appears that the plaintiff, a lad between 9 and 10 years of age, lived on the west side of Wood street, about 50 feet from the corner of Ohio avenue. The lot, however, extended to the alley between Wood street and Armstrong avenue. He had been down watching boys skating on a pond a short distance east of James street, and left there for his home, intending to go in at the alley. He passed along the south side of Ohio avenue until just after he crossed Wood street, when he started to cross Ohio avenue to the opening of the alley leading to his home. When he left the pond the Suburban train was switching in that vicinity. It was the custom for trains to stop before crossing the railroad track on James and Wood streets, to enable the trainmen to go forward to see if the crossing was clear. Just after the plaintiff crossed James street he looked back, and saw the train still switching. After he had crossed Wood street he looked again back to the east, and saw the train nearing James street; thus making it necessary for the train to stop twice before

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it passed Wood street, if it observed the custom of flagging trains that might be passing on the cross streets. After crossing Wood street he started to cross Ohio avenue, and reached a point within one or two steps of the track, when he looked again to the east, and saw the train approaching and within 15 or 20 feet of him. The engine was at the rear of the train of six or seven cars, pushing them, and no employee was at the front or west end on the lookout, though the rules of the company require it. Thinking there was not time to cross in front of the moving train in safety, the boy stepped back, in order, as he says, to get out of the way of the train; but as he did so he stumbled against and fell over one of the cinder piles, which he says he had not noticed, and which had not been leveled, but had been left three or four feet high, just as it had been dumped from the car by defendants. When he fell, he says, he tried to scramble out of the way, and slipped down off of the cinder pile, till one leg slipped under the moving train and was cut off. The other facts necessary to be stated will appear later on in the opinion.

The court below permitted plaintiff, against defendants' objection, to read in evidence section 3 of Ordinance 833 of Kansas City, Kan., making it unlawful to deposit cinders in the street, and Ordinance No. 522, prohibiting the backing of a train without a watchman at the end, requiring the ringing of the bell on all moving trains, and limiting the rate of speed to six miles an hour, without any averment in the petition of the acceptance of said ordinances by the defendants. The court, however, at the close of the evidence withdrew said ordinances by an instruction, and directed the jury to disregard the same. It is contended by defendants that under the rulings of this court in *Sanders v. Railway Co.*, 48 S. W. 855, and *Byington v. Railroad Co.*, 49 S. W. 877, the court below erred in permitting plaintiff to read the ordinances in evidence without an allegation that defendants had accepted

the same, and that the instruction given by the court at the conclusion of the evidence, directing the jury to disregard the ordinances, did not cure the error complained of. The admission of the ordinances, under the rulings of this court in the above cases, was undoubtedly erroneous. But, as the objectionable evidence had been eliminated from the case by instruction, the error in their admission was cured. It is well settled in this state that, where erroneous evidence has been admitted during the trial, the error in its admission may be cured by afterwards withdrawing the objectionable evidence from the jury. *Stavinow v. Insurance Co.*, 43 Mo. App. 513; *O'Mellia v. Railroad Co.*, 115 Mo. 205, 21 S. W. 503; *McGinnis v. Loring*, 126 Mo. 404, 28 S. W. 750. In *Stephens v. Railroad Co.*, 96 Mo. 207, 9 S. W. 589,—an action for personal injuries sustained by an employee while acting as track repairer,—it was held that the

Railroads in  
Streets—Ordinances Regulating  
Operation—Validity—Acceptance by  
Railroad.

Harmless Error.

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court may exclude improper evidence, and when this is done the fact that such objectionable evidence was heard by the jury will not operate as a reversal of the judgment. Particularly is that so where nothing appears to indicate that the verdict was in any way affected by it.

Miss Head was introduced as a witness by defendants, and testified, in effect, that about six or seven weeks before the trial she met the plaintiff on his way home from

Witnesses.

school, and had a conversation with him touching the accident; that she inquired of him how the accident occurred, and he replied that he was jumping on the car, and stumbled, and was thrown under in some way, and his leg cut off. Subsequently, on cross-examination, plaintiff's counsel brought out the fact that some time after the accident Miss Head, who had been plaintiff's school-teacher, went to his home, and saw him and his mother and sister. The witness was then asked by counsel for plaintiff if she "found out the same thing that time," to which the witness answered, "The mother stated the same thing to me that day." The witness further stated, in response to the question of plaintiff's counsel, that Hulda Anderson (plaintiff's sister) was also present at the time of the conversation referred to. Subsequently, during the course of plaintiff's testimony in rebuttal, his mother and sister were both called as witnesses, and, against the objection of defendants, were permitted to contradict the evidence brought out on the cross-examination of Miss Head. It is earnestly insisted that the court below erred in permitting the plaintiff's mother and sister to contradict Miss Head as to the conversation she testified to during the visit to plaintiff's home. We are of the opinion that plaintiff made Miss Head his own witness as to what occurred on the occasion of the visit to plaintiff's home. The court therefore erred in permitting Mrs. Anderson and her daughter to contradict Miss Head's statement by disproving the conversation with Miss Anderson as testified to by Miss Head. *State v. Branch* (Mo. Sup.) 52 S. W. 391. The error, however, in the admission of this testimony of Mrs. Anderson and her daughter, as in the instance of the introduction of the ordinances, under the circumstances, was, we think, cured by the instruction given by the court withdrawing the objectionable testimony from the jury, and directing them to disregard it.

Defendants next contend that, in so far as concerned negligence in the maintenance of the cinder pile, it was not the proximate cause of the injury. As said above,

Injury to Child  
- Negligence in  
Piling Cinders in  
near Track.

there was evidence tending to show defendants' negligent maintenance of the cinder pile. If, therefore, the pile of cinders was negligently maintained, and the plaintiff, without fault on his part, was passing along the street, and stumbled over the same, so that his leg passed under the moving train operated by the party so negligently obstructing the street, it cannot be said that

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such negligence was not the proximate cause of the injury. This point will therefore be ruled against defendants.

It is also claimed that the trial court committed error in refusing instruction No. 3 asked for by defendant the Terminal Company, in the nature of a demurrer to the evidence; the point being that the latter company was not guilty of any negligence, as the cinders in question were actually placed upon the street by the Suburban Company. By its franchise it

**Railroads in  
Streets—Duty  
to Keep Street  
in Repair—Li-  
ability for Neg-  
ligence of Lessee.**

became obligatory on the Terminal Company to maintain its track for the period of 20 years, and, as a condition to the exercise of the franchise, it was required to plank the track between and outside of the rails. In leasing to the Consolidated Terminal Company, which is one of the constituents of the Suburban Company, the latter company agreed to maintain the track; but by a paragraph in the lease the Terminal Company renounced all its duties to the public, thereby, vitiating the lease. Consequently the lessor remains liable for the acts of the lessee. Aside from this, however, the

**Same—Same—  
Same—Pleading.**

answer of the Terminal Company admits that it placed the cinders on the street for the purpose of ballasting and surfacing up the track; and by an admission made during the trial it appeared that the work was actually done by the Suburban Company, but paid for by the Terminal Company. Under these circumstances, the Terminal Company, which by its answer says that it placed the cinders on the street for its own purpose, is undoubtedly liable.

It is next insisted that the act of plaintiff (having the intelligence, experience, knowledge, and general capacity he is

**Contributory  
Negligence of  
Minors.**

shown by the evidence to possess) in approaching so near the track without looking back to see if the train was coming, and also in stepping backward from the track to avoid collision on discovery of the train close upon him, until he fell over the cinder pile, was such contributory negligence as precluded a recovery, and consequently the court below erred in giving plaintiff's fourth instruction, to the effect that if the jury should find that plaintiff was a boy of immature age and had not the capacity of an adult, and that he exercised such care as ought reasonably to have been expected from one of his age and capacity, then he was not guilty of contributory negligence. The testimony of plaintiff and his witnesses shows that the Terminal track was at the grade on Ohio avenue, running from east to west. On James street, crossing Ohio avenue at right angles and at grade, was a double-track cable street railway. These trains were running every one or two minutes. Wood street, one block west of James, also crossed Ohio avenue at right angles, and upon the same were the tracks of another railroad, also crossing at grade. The next street west, and paralleling Wood, is Armstrong avenue. At James and Wood street there were



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no watchmen. So, when defendant's train would cross these streets on the grade crossing of other roads, it was necessary for the train to stop and have one of its employees go ahead, to see if the way was clear, before signaling the train to cross. This took about two minutes at each crossing. After plaintiff crossed James street on his way home he saw the train switching several blocks distant. There was nothing in this to indicate that the train was approaching. When plaintiff got to Wood street, he said, he looked again, and the train was then near James street. After going a short distance he started to cross Ohio avenue, and when he got within one or two steps of the track he saw the train within 10 or 20 feet of him, and, thinking that it was dangerous to cross in front of it, he stepped backward, and stumbled over a cinder pile, which he says he had not seen and did not know was there; and as he fell he attempted to scramble out of the way, but slipped off the pile in such a way that one of his legs was caught and cut off by the passing train on defendant's road. On the other hand, the defendant's theory, based on the testimony of two of its employees (Rush and Hunter), is that plaintiff, with another boy, stood at a car on the side track near Wood street, and, as it passed, plaintiff ran towards it and tried to jump on the second car ahead of the engine,—the fourth or fifth from the end,—but in doing so he lost his footing, fell under the cars several feet east of the cinder pile, and was not picked up at the cinder pile, as stated by plaintiff's witnesses, but several feet east thereof, near where he received his injury. The plaintiff's story is that he went under the first or second car at the west or front end of the train. Witness Schrader testified that when he saw him he was three or four car lengths from the engine. The testimony of the witnesses Rush and Hunter was also contradicted by plaintiff's witnesses. Under the circumstances, considering plaintiff's youth and capacity, it cannot be said, as a matter of law, that he acted without ordinary care. The rule seems to be well settled in this state that a child is not to be judged by the strict standard of an adult; neither is he to be charged with contributory negligence, if he acted as might reasonably be expected from one of his age and capacity. Boland v. Railroad Co., 36 Mo. 484; McCarthy v. Railway Co., 92 Mo. 536, 4 S. W. 516; Eswin v. Railway Co., 96 Mo. 290, 9 S. W. 577; Burger v. Railway Co., 112 Mo. 238, 20 S. W. 439; Lynch v. Railway Co., 112 Mo. 420, 20 S. W. 642; Schmitz v. Railway Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; Donoho v. Iron Works, 75 Mo. 401; Riley v. Railway Co., 68 Mo. App. 652; Van Natta v. Power Co., 133 Mo. 13, 34 S. W. 505; Anderson v. Railroad Co., 81 Mo. App. 116. In Burger v. Railway Co., 112 Mo., loc. cit. 249, 20 S. W. 439, Macfarlane, J., in speaking of contributory negligence, as applied to a boy between 9 and 10 years of age, said: "Common experience and observation teach us that due care on the part of an infant does not

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require the judgment and thoughtfulness that would be expected of an adult person under the same circumstances. In the conduct of a boy we expect to find impulsiveness, indiscretion, and disregard of danger, and his capacity measured accordingly. A boy may have the knowledge of an adult respecting the dangers which will attend a particular act, but at the same time he may not have the prudence, thoughtfulness, and discretion to avoid them which is possessed by an ordinarily prudent adult person. Hence the rule is believed to be recognized by all the courts of the country that a child is not negligent if he exercises that degree of care which under like circumstances would reasonably be expected of one of his years and capacity. Whether he uses such care in a particular case is largely a question for the jury." In the more recent case of *Anderson v. Railroad Co.*, 81 Mo. App. 116,—an action by plaintiff's father against the present defendants for expenses incurred and loss of the boy's services,—the controlling facts were identical with the case at bar. The Kansas City court of appeals, in an opinion written by Judge Ellison, and concurred in by the other members of the court, held that a given act, charged to be contributory negligence, cannot be applied to all persons alike. If the party doing the act is a child, the question is not whether the act is such that an ordinarily prudent person of mature years would have committed it, but is whether the act is such as might be expected from a child of the knowledge, age, and discretion the party charged is shown to be. In course of the opinion it is said: "The reason of the rule exempting children from responsibility does not depend so much on the knowledge and sprightliness of the child as it does on his indiscretion, imprudence, lack of judgment, and impulsiveness. All children nine years old know as well as grown persons that if a railway car runs over them it will kill or maim them. They know that as well as they know that fire will burn them. Yet, speaking generally, of course, all children near that age are by nature more reckless and thoughtless than grown persons, and consequently are more likely to be run over or burned. The law of nature has implanted thoughtlessness and imprudence in the child, as it has prudence and caution in the ordinary man." Of course, there are cases in which the court can say, as a matter of law, that under the peculiar facts of the case the child did not act as one of his age and capacity should have acted, and consequently was guilty of such contributory negligence as to preclude a recovery. This, however, is not such a case. We have been referred by the learned counsel for defendants to a line of authorities of which *Payne v. Railway Co.*, 136 Mo. 562, 38 S. W. 308, is a type, in which it is claimed that the court in banc held that in the case of a boy about the plaintiff's age, with intelligence and knowledge of the danger connected with crossing railroad tracks, he is chargeable with contributory negligence, just as an adult person would be. Judge

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Sherwood, who wrote the opinion in the Payne Case, never contemplated a departure from the rule laid down in *Burger v. Railway Co.*, supra. These cases merely decide that a child may so act, notwithstanding his youth, as to be guilty of contributory negligence as a matter of law. But they do not decide that the child's age is not to be taken into consideration, even if he was at the time of the accident a bright, intelligent, and active child. These cases simply hold that under the peculiar facts of the particular case, considering the child's age and intelligence, he did not act as one of his age and capacity might reasonably have been expected to act. We are of the opinion that under the facts in this case the question whether plaintiff used such care as ought reasonably to be expected from one of his age and capacity was properly submitted to the jury by the instruction complained of.

The defendants challenge the correctness of plaintiff's second instruction, which is as follows: "If the jury find from

the evidence that defendants, or either of them,  
**Instructions.** on or about December 7, 1895, negligently placed or maintained a pile of cinders upon Ohio avenue, in Kansas City, Kan.; that it was unnecessary to have said cinders in such condition as you may find them to have been; that such cinders constituted an obstruction to travel upon said street, and did not leave the street in a reasonably safe condition, and that plaintiff stepped upon or against the same, and was thereby thrown to the ground, so that passing cars ran over one of his legs, crushing and mangling it,—then plaintiff is entitled to a verdict against the defendant or defendants which you find to have so placed and maintained the pile of cinders, provided you further find that there was negligence in placing and maintaining such cinders, and such negligence, if any, was the cause in producing the injury, and that plaintiff was not, on his part, guilty of negligence which directly contributed to his injury." It is insisted that the question whether the cinder pile remained in the street an unreasonable length of time was not submitted to the jury by this instruction, as it should have been. This error was cured by instruction No. 15 given for defendants. By this instruction the jury were told, in effect, that defendants had the right to leave material in the street with which to construct or repair its track, provided the same was used for the purpose of repairing or surfacing the track within a reasonable time after they were left in the street. So, when these two instructions are considered and read together, the question whether defendants unreasonably prolonged such use of the street was fairly submitted to the jury. It is not perceived how defendants could possibly have been prejudiced thereby. The rule is clear that if any omission exists in plaintiff's instructions, and it is supplied by those given for defendants, the error is cured. *Owens v. Railroad Co.*, 95 Mo. 169, 8 S. W. 350; *Meadows v. Insurance Co.*, 129 Mo. 76, 31 S. W. 578. As the omission in plaintiff's

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counsel for plaintiff, in his closing argument to the jury, in which he, referring to the franchise granted to the defendants, said, over defendants' objection, that "they were lawbreakers from the jump."

Remarks of  
Counsel.

As all that counsel said in regard to the matter does not appear from the record, we cannot say there was any abuse of discretion by the trial court. There is certainly nothing in the brief reference to this subject in the record that would justify the reversal of a judgment otherwise properly obtained.

The defendants finally make the point that plaintiff having brought suit on statutory or ordinance negligence, should not have been permitted to recover for common-law negli-

Railroads in  
Streets—Plead-  
ing—Personal  
Injuries—Neg-  
ligence in Piling  
Cinders near  
Track—Violation  
of Ordinance—  
—Right of Re-  
covery at  
Common Law.

gence, as the latter was a different cause of action, and, if recovery was permissible for it, such could have been the case only on an amended petition. Unfortunately for defendants' contention, the petition is not based upon the ordinance. The averments in relation to the ordinance are merely cumulative. Eliminate all reference to the ordinance, and enough remains to state a good cause of action of common-law negligence. The petition, in part, reads as follows: "At the side of and between the said tracks, and in said city, upon the said street, the defendants negligently placed, and on December 7, 1895, negligently maintained, a pile of cinders and ashes, constituting an obstruction to the travel upon said street. Said obstruction made the street unsafe for travel, and directly violated the terms of section 3 of Ordinance 883 of this city." The above allegations were followed immediately by the proper averments of the ordinance. Manifestly, this paragraph of the petition states a good cause of action of common-law negligence, independent of the ordinance. While the averment is made that such obstruction was prohibited by the ordinance of the city, still it will be observed that the unsafe condition of the street is the basis of the cause of action. In making out his case the plaintiff was not confined to the ordinance. The evidence tended to show that it was negligence in defendants to leave the cinders piled up in the street. Hence it cannot be said, there was an entire failure of proof; neither was there a variance, but merely a failure to prove the cause of action in its entirety. Enough, however, was shown to sustain the action. As was said in *Werner v. Railway Co.*, 81 Mo. 368, "it is not a case of variance, but an instance in which negligence of the character alleged is proven, but not to the extent alleged, but sufficient to support the action." The case at bar is unlike and clearly distinguishable from *Hansberger v. Railroad Co.*, 43 Mo. 196; *Holliday v. Jackson*, 21 Mo. App. 660; *City of Kansas City v. Hart* (Kan. Sup.) 57 Pac. 939; *Railway Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983,—cited by counsel for defendants.

Notes

The case seems to have been fairly tried, and, there being no error substantially affecting the merits, the judgment will be affirmed. All concur.

NOTES.

LESSOR'S LIABILITY FOR INJURIES INFLICTED WHILE ITS ROAD IS OPERATED BY LESSEE.

**General Rule.**—A railroad company which has leased its road, cars, and engines, and allows the lessee company to operate the same, is liable to third persons, or the public, for the carelessness and negligence of the lessee, and for defects in the construction or maintenance of the road and its equipments, unless there is a statutory provision to the contrary.

*United States.*—*Railroad Company v. Barron*, 5 Wall. (U. S.) 90, 104; *Washington, etc., R. Co. v. Brown*, 17 Wall. (U. S.) 445.

*Georgia.*—*Singleton v. Southwestern R. Co.*, 70 Ga. 464, 48 Am. Rep. 574, 21 Am. & Eng. R. Cas. 226.

*Idaho.*—*Palmer v. Utah & Northern R. Co. (Idaho)*, 36 Am. & Eng. R. Cas. 443.

*Illinois.*—*Balsley v. St. Louis, A. & T. H. R. Co.*, 119 Ill. 68; *Chicago, St. P., etc., R. Co. v. McCarthy*, 20 Ill. 385; *Illinois Cent. R. Co. v. Finigan*, 21 Ill. 646; *Illinois Cent. R. Co. v. Kanouse*, 39 Ill. 272; *Ohio, etc., R. Co. v. Dunbar*, 20 Ill. 623; *Peoria, etc., R. Co. v. Lane*, 83 Ill. 448; *Pennsylvania Co. v. Ellett*, 132 Ill. 654; *Leshner v. Wabash Nav. Co.*, 14 Ill. 85; *Pittsburg, C. & St. L. R. Co. v. Campbell*, 86 Ill. 443; *St. Louis, etc., R. Co. v. Balsley*, 18 Ill. App. 79; *Toledo, P. & W. R. Co. v. Rumbold*, 40 Ill. 143; *Wabash, etc., R. Co. v. Peyton*, 106 Ill. 534, 18 Am. & Eng. R. Cas. 1; *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364.

*Iowa.*—*Bower v. Burlington, etc., R. Co.*, 42 Iowa 546.

*Kansas.*—*St. Louis, etc., R. Co. v. Curl*, 28 Kan. 622, 11 Am. & Eng. R. Cas. 458.

*Massachusetts.*—*Bremlin v. Somerville Horse R. Co.*, 145 Mass. 64, 32 Am. & Eng. R. Cas. 406; *Ingersoll v. Stockbridge, etc., R. Co.*, 8 Allen (Mass.) 438, 7 Am. & Eng. R. Cas. 410; *Langley v. Boston, etc., R. Co.*, 10 Gray (Mass.) 103; *Norwich, etc., R. Co. v. Worcester*, 147 Mass. 518, 36 Am. & Eng. R. Cas. 447.

*Minnesota.*—*Freeman v. Minneapolis, etc., R. Co.*, 38 Minn. 443.

*Missouri.*—*Brown v. Hannibal, etc., R. Co.*, 27 Mo. App. 394.

*New York.*—*York & Maryland L. R. R. Co. v. Winans*, 17 How. (N. Y.) 39.

*North Carolina.*—*Pierce v. North Carolina R. Co. (N. Car.)*, 13 Am. & Eng. R. Cas., N. S., 666.

*Oregon.*—*Lakin v. Willamette Valley, etc., R. Co.*, 13 Ore. 436, 26 Am. & Eng. R. Cas. 611.

*South Carolina.*—*Harmon v. Columbia, etc., R. Co.*, 28 S. Car. 401; *Hart v. Charlotte C. & A. Co. (S. Car.)*, 10 L. R. A. 794, 33 S. Car. 427, 12 S. E. Rep. 9.

*Texas.*—*Central, etc., R. Co. v. Morris*, 68 Tex. 49, 28 Am. & Eng. R. Cas. 50.

*Vermont.*—*Nelson v. Vermont, etc., R. Co.*, 26 Vt. 717, 62 Am. Dec. 631.